

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

JOSEPH A. CANNATA,

Respondent.

Petition for a Writ of Certiorari
To the Court of Appeal of the State of California,
First Appellate District, Division Three

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

ALLSTATE INSURANCE COMPANY,
Petitioner,

VS.

JOSEPH A. CANNATA,
Respondent.

Petition for a Writ of Certiorari To the Court of Appeal of the State of California, First Appellate District, Division Three

The petitioner, Allstate Insurance Company, ("Allstate"), defendant in the above-entitled action, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Three ("Court of Appeal") entered in this proceeding on October 20, 1976.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeal in *Cannata v. Allstate Insurance Company* ("Opinion") is reproduced as Appendix A.¹

1. Pursuant to Rule 976, California Rules of Court, the subject opinion was not certified for publication in the Official Reports.

The order of the Court of Appeal denying Allstate's Petition for Rehearing, not officially reported, is reproduced as Appendix B.

The order of the California Supreme Court denying Allstate's Petition for Hearing, not officially reported, is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeal was entered on October 20, 1976. A timely Petition for Rehearing was denied by the Court of Appeal on November 19, 1976. A Petition for Hearing before the California Supreme Court was timely filed and was denied by that Court on December 29, 1976. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date, and is therefore timely. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942), *re. den.*, 318 U.S. 802 (1943); *United States v. Healy*, 376 U.S. 75, 77-80 (1964).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Should state court jurisdiction over employer conduct, i.e., discharge of an employee for pro-union activity or statements, be pre-empted by federal law?
2. Is a state court free to ignore special jury findings and refuse to apply the "arguably" rule mandated by *San Diego Building Trades v. Garmon*?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Article VI, Clause 2:
 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization is a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. § 158a:

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 157; . . .
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT OF THE CASE

Petitioner, Allstate, seeks this Court's review of a judgment rendered against it in an action brought by respondent for breach of an employment contract and fraud. A jury returned verdicts of \$150,000 compensatory damages and \$500,000 punitive damages in favor of respondent and judgment was entered accordingly. The action arose out of the termination of respondent's employment with Allstate on May 26, 1968.

On October 3, 1960, respondent was hired as a claims adjuster in Allstate's San Francisco District Office. He progressed in the skills of claims adjusting and in July, 1962 he was promoted to casualty claim examiner. In March, 1964, respondent was promoted to casualty claims supervisor. He held that position until his termination in May, 1968.

Respondent pleaded and at trial offered evidence which he claimed showed that his termination was the result of the fraudulent conduct of Allstate in misrepresenting at the outset of his employment in 1960 that it was a fair and ethical company, that he could continue to work for Allstate until his normal retirement at age 62 so long as he substantially complied with all of Allstate's directions save those which would be unlawful, and that if his employment was ever in jeopardy he would be given notice and the opportunity to improve. During his employment respondent became increasingly critical of Allstate's policies, including those relating to the handling and disposition of insurance claims. He criticized several of Allstate's policies in front of his colleagues and subordinates.

Respondent also defied Allstate's policy regarding union activity among its adjusters. He encouraged union organization despite his knowledge that management wanted no unions at Allstate. Respondent also criticized Allstate's no-union policy and on one occasion invited several other adjusters to his or another adjuster's residence where he and several claim adjusters met to discuss organization of the union among claim adjusters.

A memorandum in the Allstate employee relations file dated September 5, 1967 advises management that "2 people in S.F. Joe Canata Supr. Tom Gedge dispatch adj. would be interested in organizing. Canata's brother is a union organizer for unknown group."

On May 3, 1968 respondent's immediate superior wrote the Regional Manager recommending that respondent be dismissed for his unsatisfactory attitude and exercising unsatisfactory leadership as a supervisor. The first paragraph of that three-paragraph letter is devoted to respondent's pro-union activities and statements:

On May 2, Casualty Director Bud Danen was in the San Francisco office in connection with our telephone investigation claim handling. While Bud was there he had a conversation with Joe Cannata in which Joe said the he understood the union was getting a foothold. Bud asked what he meant by 'foothold' and Joe replied, 'Well, there is a lot of talk about a union among claims men.' Bud then said, 'We don't need one at Allstate' and Cannata replied, 'I don't know, I think it might do a lot of good to have one here.'

The letter concluded as follows:

"I therefore recommend that we dismiss him immediately for an unsatisfactory attitude and exercising unsatisfactory leadership."

Respondent was terminated on May 21, 1968. He commenced this action by filing suit on May 13, 1969. Jury trial of this action began on August 5, 1974. On September 6, 1974 the jury returned a verdict in favor of respondent, awarding him \$150,000 compensatory and \$500,000 punitive damages.

In addition to the general verdict, the jury returned answers to two special interrogatories which had been submitted to them by the trial judge:

"1. We find the Plaintiff, JOSEPH A. CANNATA when he was terminated by Defendant, ALLSTATE INSURANCE COMPANY, a corporation, held a position as a:

Managerial employee	[]
Non-managerial employee	[X]

2. Were pro-union activity or statements a material factor in the termination of employment of Plaintiff, JOSEPH A. CANNATA, by Defendant, ALLSTATE INSURANCE COMPANY, a corporation:

[X] Yes [] No."

These special interrogatories had been submitted to the jury by the trial judge after extended discussions and arguments by the parties arising out of Allstate's requested instruction to the jury on the subject of respondent's pro-union activity.

On review the Court of Appeal found that these findings were supported by substantial evidence:²

This finding was supported by substantial evidence, as previously discussed. (Opinion, p. 4).

The Court of Appeal also found that the record contained evidence that by discharging respondent, Allstate attempted to "chill" or interfere with employee's rights³ under the Act:

There can be no question here that there is evidence that Allstate was at least attempting to 'chill' the employee's right under Section 7, if not in fact interfere with that right. (Opinion, p. 7).

The Court of Appeal, however, disregarded the jury's special findings as "surplusage", and held that because Cannata's union activity was "peripheral to the case" Cali-

2. Though the Court of Appeal referred to the findings in the singular, its discussion of their significance shows that it was considering both.

3. Since the special finding held that plaintiff was a nonmanagerial employee he is an employee within the meaning of § 2(3) of the N.L.R.A. and entitled to the protection of § 7 and § 8 of the Act. The Court of Appeal agreed. Even if plaintiff had been a managerial employee, suit upon his discharge would have been preempted. *Iron Workers Union v. Perko*, 373 U.S. 701, 707 (1963); *Beasley v. Food Fair of North Carolina, Inc., et al.*, 416 U.S. 653 (1974).

fornia's jurisdiction to award money damages was not preempted. Accordingly, it affirmed the judgment of the trial court. The Court of Appeal denied Allstate's petition for rehearing and the California Supreme Court denied a petition for hearing with three of the seven justices voting to grant the petition. The judgment of the Court of Appeal thereby became final, which judgment is the subject of this petition.

PRESENTATION OF THE FEDERAL QUESTION

The federal question for which this petition seeks review was seasonably raised by petitioner during the trial. This was done by the proffer of an instruction to the jury by petitioner to the effect that if the jury found respondent was terminated for pro-union activity, solicitation or sympathy, it could not return a verdict for him. This and similar instructions were refused by the trial court which, after hearing argument by counsel, determined to present the labor preemption issue to the jury in the form of special interrogatories pursuant to California Code of Civil Procedure, Section 625. Petitioner submitted a form of such interrogatories, but the trial court refused it as presented and submitted its own form to the jury (Statement of the Case, p. 6).

Following rendition of the jury verdict, petitioner timely filed and argued post-trial motions, one of which was to vacate the judgment for respondent and enter judgment of dismissal on the ground that under the provisions of California Code of Civil Procedure, Section 625, the general verdict was inconsistent with the special findings and was controlled by such findings. The argument was premised on the principle that since the jury's special findings meant that respondent's discharge by petitioner was arguably an

unfair labor practice, the cause of action was preempted and the trial court had no jurisdiction to enter any judgment for respondent. This motion was denied and a timely appeal was taken therefrom.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeal Deliberately Refused to Concede That California's Jurisdiction Over This Case Is Preempted by Federal Law.

Notwithstanding a jury finding (found by the Court of Appeal to be supported by substantial evidence) that Allstate's discharge of plaintiff was motivated, in material part, by his pro-union activities or statements, the Court of Appeal refused to apply the doctrine of federal preemption and order dismissal of the action. In concluding the preemption doctrine was inapplicable because plaintiff's union activities were "peripheral to the case", the Court of Appeal invented a totally new and unsupported formulation of the preemption rule which is in clear and present conflict with the many relevant decisions of this Court. This Court is continually called upon to exercise its responsibility to insure that the state courts do not infringe upon federal jurisdiction. One area where federal jurisdiction is paramount is in labor relations which, for present purposes, are exclusively governed by the National Labor Relations Act, as amended ("Act"). The Court of Appeal's decision below is a flagrant and direct intrusion into the exclusive jurisdiction of the National Labor Relations Board ("Board"). This Court should therefore grant the petition for certiorari in order to set aside the decision below and restore the proper balance between state and federal power in the sensitive area of labor relations.

A. THE BASIC PREEMPTION RULE IS THAT STATES ARE FORECLOSED FROM JURISDICTION OVER ANY CONDUCT ARGUABLY AN UNFAIR LABOR PRACTICE UNDER THE ACT.

Sections 7 and 8 of the Act (29 U.S.C. §§ 157, 158) define protected and prohibited labor activities. In *San Diego Building Trades v. Garmon*, 359 U.S. 236, 244 (1959)⁴ this Court ruled that in passing the Act, Congress mandated uniform application of its rules regarding employment relations and elimination of conflicts resulting from varying local statutes and rules of decision regarding labor problems. The Court explained:

Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes. (*Id.* at 244).

Prompted by these considerations, this Court established the federal preemption rule governing the employment relations area, and held that if the conduct in question is "arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board . . ." (*Id.* at 245, emphasis added.)

This preemption rule was recently reaffirmed in *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, et al.*, U.S.L.W., 45 L.W. 4263, 4265 (opinion filed March 7, 1977) where a unanimous Court through Justice Powell stated:

4. The history of the *Garmon* litigation is significant. In *San Diego Building Trades v. Garmon*, 45 Cal.2d 657 (1955) the California Supreme Court upheld a damage award to an employer based on a union's secondary picketing. The United States Supreme Court reversed in *San Diego Building Trades v. Garmon*, 353 U.S. 26 (1957) on the basis of preemption, and remanded. The California Supreme Court then held that the union activities constituted a tort under state law, and reaffirmed the award. (49 Cal.2d 595). However, the United States Supreme Court again reversed the California Supreme Court in *Garmon II*.

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. (359 U.S. at 244.)

The crucial feature of the rule is that the conduct in question need only be *arguably* subject to sections 7 or 8 of the Act to oust the state court of jurisdiction. In *Garmon*, *supra*, Mr. Justice Frankfurter explained why only this minimal threshold is required to trigger the preemption rule:

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. (*Garmon*, *supra* at 244-5).

This rule of preemption is an expression by this Court of binding federal law, and under the supremacy clause of the United States Constitution, the Court of Appeal was required to apply such rule. United States Constitution Article VI, Clause 2; *Gibbons v. Ogden*, 22 U. S. 1 (1824).

The rule of preemption was established long ago by this Court with both clarity and vigor. It has been reaffirmed on several occasions in equally convincing terms. Here the Court of Appeal was presented with facts specially found by

a jury, and with a record which by its own concession was consistent with the application of the preemption rule. Yet, it chose to ignore its duty and, in a thinly disguised effort to preserve what it considered to be a proper result, disobeyed the unequivocal directions of this Court to terminate state jurisdiction over this dispute. The Court of Appeal judgment stands in open defiance to the many decisions of this Court which compel preemption in these circumstances. So clear is the path and so cogent the mandate that the judgment below appears to be a deliberate confrontation with the preemption decisions of this Court. It should be dealt with accordingly.

B. THE SPECIAL FINDINGS THAT A MATERIAL REASON FOR HIS DISCHARGE WAS PRO-UNION ACTIVITY OR STATEMENTS ESTABLISHED THAT PLAINTIFF'S DISCHARGE WAS ARGUABLY AN UNFAIR LABOR PRACTICE.

Section 8(a)3 of the Act makes it an unfair labor practice for an employer:

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . (29 U.S.C. § 158(a)(3)).

Section 8(a)1 makes it an unfair labor practice for an employer:

to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § [7] . . . (29 U.S.C. § 158(a)1).

Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mu-

tual aid or protection, and shall also have the right to refrain from any or all of such activities . . . (29 U.S.C. § 157; emphasis added.)

Petitioner contends that the Court of Appeal need have gone no further in its consideration of this issue than to measure the effect of the special findings of the jury and its own review of the trial record against the quoted provisions. The jury found that Allstate *discharged* respondent, in material part, because of his *pro-union activity* and *statements*. Such conduct, at the very least, *arguably* falls within the prohibitions of Section 8(a)(3) of the Act. It requires no citation of cases or elaborate exercise in logic to reach this conclusion. The very words of Section 8(a)(3) proscribe discrimination in tenure of employment to discourage membership in any labor organization. What else is discharge for pro-union activity or statements than the grossest form of such discrimination? Again, in Section 7, one finds that employees are protected in their right to self-organization or to form, join or assist labor organizations and that Section 8(a)(1) flatly prohibits employer interference with these rights. The Court of Appeal found that "[T]here can be no question here that there is evidence that Allstate was at least attempting to 'chill' the employee's rights under Section 7, if not in fact interfere with that right." (Opinion, p. 7). Petitioner urges that the nearly perfect alignment between the facts found by the Court of Appeal and the prohibitions of the statutory provisions should have compelled a ruling that Allstate's conduct was arguably an unfair labor practice, *per se*, without any further examination of case authority on the subject. The question was closed at that point.

However, if further inquiry on this subject was deemed necessary, it is clear that the same result should have

obtained. Together the quoted statutory provisions have been interpreted to guarantee employees or even a single employee the right to engage in a broad spectrum of activities for mutual aid and protection ranging from organizing unions to merely discussing them. It has been the position of respondent throughout this litigation that because there was no evidence in the record of activity of a formally constituted labor organization, this was not really a "labor" case wherein the doctrine of preemption would have any application. As this Court knows, the argument is wholly specious.

This Court long ago decided that there need be no formal labor organization on the scene to qualify the jointly sponsored activities of employees as "concerted activities" for purposes of their protection under Section 7 of the Act. *N.L.R.B. v. Washington Aluminum Company*, 370 U.S. 9 (1962). There it was held that unorganized workers who walk out to protest coldness of their work area are protected in these activities even though no formal demand was made upon their employer to rectify this condition of employment prior to their walkout and no labor union was present. Lower federal courts and the Board have consistently bowed to this line of authority. Thus, where two employees merely discuss the need for union organization, they are protected by section 7. In *Root-Carlisle, Inc.*, 92 N.L.R.B. No. 203, 27 L.R.R.M. 1235 (1951), discharge of an employee for such a discussion was held to violate 8(a)1 and 8(a)3. In *N.L.R.B. v. Quest-Shon Mark Brassiere Company*, 185 F.2d 285 (2d Cir. 1950) *cert. den.* 342 U.S. 812 (1951) several employees discussed organizing and circulated a petition to probe union interest. None were union members. The court ruled that their discharge was an unfair labor practice. In *N. & G. Chrysler-Plymouth*, 186

N.L.R.B. No. 45, CCH Lab.L.Rep. ¶22, 423 (1970) the Board ruled that discharge of an employee for suggesting to co-workers that they should organize a union was a violation of sections 8(a)1 and 8(a)3.

Even mere griping and complaining are protected activities within the meaning of section 7 when there is contemplation of collective activity. *N.L.R.B. v. Buddies Supermarkets*, 481 F.2d 714, 717-718 (5th Cir. 1973); *Mushroom Transportation v. N.L.R.B.*, 330 F.2d 683 (3rd Cir. 1964).

Activity designed to further the interests of more than one worker is "concerted activit[y] for the purpose of . . . mutual aid or protection" within the meaning of section 7 even though only one person may be active. *Salt River Valley Water Users' Ass'n. v. N.L.R.B.*, 206 F.2d 325, 328 (9th Cir. 1953); *Randolph Division, Ethan Allen, Inc. v. N.L.R.B.*, 513 F.2d 706 (1st Cir. 1975).

Finally, a discharge is an unfair labor practice even if it is motivated only *in part* by anti-union animus. *Ridgely Manufacturing Co. v. N.L.R.B.*, 510 F.2d 185, 186 (D.C. Cir. 1975); *S. A. Healy Co. v. N.L.R.B.*, 435 F.2d 314, 316 (10th Cir. 1970). In this case the jury found that plaintiff's pro-union activity or statements were a *material factor* in his discharge.

These authorities show that if individual action is for the purpose of mutual aid, then it is afforded the same level of protection as organized group or union activities. These cases also demonstrate, beyond any reasonable doubt, that the special findings compel the conclusion that respondent's discharge was arguably an unfair labor practice, for the jury found that he was discharged, in *material part*, for *pro-union activity or statements*. Indeed, there is no more effective means of discouraging "pro-union

activity or statements" than by firing those employees who engage in it.⁵

Here again, the Court of Appeal was confronted with jury findings and trial record which demanded the application of the preemption doctrine. The Court of Appeal deliberately sidestepped its judicial duty and, on the basis of its own completely novel and unprecedented distortion of the *Garmon* test, refused to terminate state jurisdiction. Such discretionary abuse cannot stand uncorrected.

C. THE COURT OF APPEAL MISUNDERSTOOD THE PREEMPTION RULE OR MISAPPLIED A RECOGNIZED EXCEPTION THERETO.

The few well-defined exceptions to the preemption rule are frequently grouped under two headings: (1) *activities* merely peripheral to the *concerns* of the Act; and (2) *conduct* touching interests so deeply rooted in local responsibility that it cannot be concluded in enacting the Act that Congress intended to deprive the states of jurisdiction. See *Garmon*, at 243, 244. The second group of exceptions may be put to one side since none of these exceptions applies to the instant case and neither respondent nor the Court of Appeal has suggested the contrary. More particularly, nothing contained in this Court's recent opinion in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25, et al, supra*, compels a different result. Nothing appears either in the pleadings or the evidence of the instant case which begins to approach from afar the egregious conduct complained of and the injury

5. Intent to discriminate is *conclusively* presumed when the employer's conduct is deemed "inherently destructive" of important employee rights and presumed if it *could have* affected employee rights to some extent. *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). Under this standard the requisite intent would be conclusively presumed in this case, for what could be more destructive of employee rights than discharge?

sustained in *Farmer*. Mr. Justice Powell was precise in limiting the permissible cause of action in *Farmer*, intentional infliction of emotional distress, to a situation where "the defendants had intentionally engaged in 'outrageous conduct, threats, intimidation, and words' which caused Hill to suffer 'grievous mental and emotional distress as well as great physical damage'" (*supra* at 4266). To further close the loop around this precisely limited exception to the preemption rule, Mr. Justice Powell was again careful to point out that employment discrimination within the federal regulatory scheme cannot itself become the predicate for the "outrageous" conduct upon which a state court tort action can be based. State court recovery may only proceed from additional facts over and above employment discrimination which satisfy the requirement for recovery based upon state tort law. In the instant case it is obvious that the additional facts are not present.

The Court of Appeal may have misconstrued the first exception and erroneously applied it to this case.⁶ It purported to rely upon *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958) and *Sears Roebuck & Co. v. San Diego Council of Carpenters*, 17 Cal.3d 893 (1976) cert. granted U.S. (1977) as authority for its distorted formulation of the "peripheral" test. Indeed, the real "peripheral" test had its genesis in the *Gonzales* opinion. However, *Gonzales* provides no authority for holding that the preemption rule is inapplicable where the protected union activity is merely peripheral to the case. Mr. Justice Frankfurter's opinion in *Gonzales* explains why a suit over purely internal union matters is not preempted:

6. Because of the ambiguity of the Opinion (see Opinion, p. 7) in this regard, it cannot be determined whether the Court of Appeal believed the *Garmon* preemption rule did not apply in the

... the potential conflict is *too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act*, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. (*Id.* at 621; emphasis added.)

This holding was based on the Supreme Court's perception that the conduct involved in *Gonzales*, because it related solely to *internal union matters*, was remotely connected to the purpose of the Act. *Gonzales* does not hold or even remotely suggest that where "evidence of . . . unionization activities . . . [is] merely peripheral to the case . . . [there is] an insufficient basis for depriving the state court of jurisdiction." (Court of Appeal Opinion, p. 7.)

Likewise, in *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, *supra*, the California Supreme Court properly recognized in dictum that the *Gonzales* exception to the preemption rule is justified "where the *activity regulated* was a merely peripheral concern of the Labor Management Relations Act." (*Id.* at 901).

These decisions demonstrate that the "peripheral" exception is limited to cases where the conduct in question is *peripheral to the concerns of the Act*. All prior decisions of this Court have confined this exception to disputes arising from purely *internal union matters*. The case at bar does not concern itself with internal union matters and it cannot be seriously contended that discharge of an employee for pro-union activity or statements is peripheral to the concerns of the Act. Thus, these decisions furnish no authority for the Court of Appeal's misconception that the preemption rule was inapplicable.

Moreover, the "peripheral to the case" standard invented by the Court of Appeal is in direct conflict with and under-

first instance or that the case at bar fell within the so-called "peripheral" exception articulated in *Gonzalez*. In either case, its reasoning is fatally flawed.

mines the basic policy of *Garmon* and its progeny. This Court's opinion in *Garmon* makes clear the policies of the Act require that any judicial action, seeking either injunctive relief or damages because of conduct which is arguably an unfair labor practice must be preempted:

Our main concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. *Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.* (*Id.* at 246; emphasis added.)

and earlier:

Nor has it mattered whether the States have acted through the laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to *control conduct* which is the subject of national regulations would create potential frustration of national purposes. (*Id.* at 244; emphasis added, footnotes omitted.)

Thus, suits for discharge, whether based on tort, contract, or any other common law theory, have consistently been held preempted if the discharge was arguably an unfair labor practice. In *Amalgamated Association of Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) this Court reversed a union member's judgment for damages against a union for breach of contract and procurement of dis-

charge.⁷ The Court found the discharge to be arguably an unfair labor practice, and explained:

"At *bottom*, of course, the Union's action in procuring Lockridge's dismissal from employment is the *conduct* which Idaho Courts have sought to regulate . . .

"[I]t would seem that this case indeed represents one of the clearest instances where the *Garmon* principle . . . should operate to oust state court jurisdiction." (*Id.* at 292-293; emphasis added.)

Discharge is discharge, and the language of *Lockridge* applies with even more force to this case. Like *Lockridge*, at the "bottom" of this case, is conduct causing a discharge. Indeed, the instant case presents the perfect example of that which is the intended object of the protections or prohibitions of the Act. Here we are dealing with the relationship of employer-employee uncomplicated by the presence of a labor organization as the supporting actor in the drama of discharge. One cannot imagine a relationship, and an act in derogation of that relationship, more central to the concerns of the Act than is presented by this case, i.e., an employer's termination of an employee because of his pro-union activities or statements.

It is Allstate's conduct—discharging respondent for pro-union activity or statements—which triggers preemption. Whether pro-union activity is peripheral to the case is simply immaterial and the Court of Appeal fell into stark error in concluding otherwise.

7. For a union to cause or attempt to cause an employee's discharge for his union membership or non-membership is an unfair labor practice under § 8(b)2 of the N.L.R.A. and within the exclusive jurisdiction of the N.L.R.B. Petitioner submits that the recent opinion in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25, et al.*, *supra*, specifically reaffirms the soundness of the *Lockridge* decision and these arguments based upon the *Lockridge* holding.

The special findings⁸ of the jury and the evidence supporting them require the conclusion that, at the very least, Allstate's discharge of petitioner was arguably an unfair labor practice.

D. A STATE COURT MAY NOT IGNORE JURY FINDINGS AND EVIDENCE SHOWING THAT THE CONDUCT IN ISSUE WAS AN UNFAIR LABOR PRACTICE.

This Court has yet to declare the sources to which a state court must look to determine whether the conduct it is concerned with is arguably an unfair labor practice. In this case, the Court of Appeal believed that it was free to ignore the special findings of the jury which unavoidably lead to the conclusion that the conduct in question was arguably an unfair labor practice. In addition, the Court of Appeal ignored substantial portions of the trial record as well, stating that the record "as a whole" made it appear that the question of unfair labor practice was "peripheral to the case." If this Court's ruling, that passage of the Act by Congress mandated uniform application of federal in place of state law is to have meaning, then such cavalier disregard of these sources cannot be permitted. If a state court is free to select which sources of evidence it will credit in making the threshold finding of whether a particular course of conduct was preempted, there is no meaning left to the term "arguably."

A state court, jealously seeking to preserve its own jurisdiction, might disregard those sources which clearly point, as here, to a conclusion that an unfair labor practice argu-

8. In the case of *Local 100, Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963), this Court specifically endorsed the use of the special findings of a jury as the test for preemption. It held that, on the basis of special jury findings, the defendant's conduct was arguably an unfair labor practice, and that therefore the jurisdiction of the Texas courts was preempted.

ably had been committed. It might consider itself free to credit only those sources which point to the conclusion that the exercise of state jurisdiction was proper. If the preemption rule is to have vitality at all, this Court should now mandate that those sources of evidence properly before a state court on appellate review must be received and acted upon regardless of the result. No state court should be free to "weigh" the evidence in the fashion of the Court of Appeal here to determine whether a particular case was "in essence" not one which involved a labor relations question. It is not within the prerogative of a state court to engage in such a process when this Court has previously ordained the proper course to be followed.

II. This Court's Decision in *Farmer v. Carpenters* Mandates the Grant of This Petition and the Summary Reversal of the Decision of the Court of Appeal.

Any doubt that this case was subject to the federal preemption rule has been erased by this Court's decision in *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, et al., supra*. In reaching its determination that the cause of action presented therein was beyond the purview of the preemption rule, this Court made a number of affirmative statements clearly defining the boundaries of the zone of preemption. Consideration of the causes of action sued upon by the respondent in this case and for which he received huge money damages, compels the conclusion that the case is clearly subject to preemption and should never have been allowed to go to judgment.

In *Farmer* this Court required that for a state tort action to proceed, it must appear that the gravamen of that tort be wholly separate and apart from the merits of the underlying labor dispute:

But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. (*Id.*, at 4267)

If one removes the underlying employment discrimination arguably perpetrated on the respondent, there is nothing left. The jury specially found that the respondent was terminated *in material part* by reason of his pro-union activity or statements. As demonstrated earlier in this Petition, termination of employment is the central concern of the Act. It does no good to claim, as did respondent, that this termination of employment happens to be the breach of an oral contract or the culmination of petitioner's fraudulent behavior toward plaintiff. As recognized numerous times throughout the Court of Appeal's Opinion, this case was one of wrongful termination of employment. The independent unrelated circumstances which Justice Powell stressed are the pre-requisite for escape from the federal preemption rule are simply not present here.

Petitioner emphasizes that what this Court found to be a risk in the *Farmer* case is a reality. Mr. Justice Powell was concerned that the *Farmer* jury *may* have rested its award of damages upon the employment discrimination practices against Mr. Hill rather than solely upon the abusive and unrelated activities of the union in its infliction of emotional distress upon him. The jury's verdict was vacated so that it could be properly instructed upon retrial that damages may not be based upon the union's discriminatory conduct. Here, there is more than a risk that respondent

may have been awarded damages for federally protected activity; The forbidden result has occurred. The jury specially found that respondent was terminated for his pro-union activity or statements (conduct which is necessarily employment discrimination prohibited by §§ 8a(1) and (3) of the Act) and awarded total damages of \$650,000. In the face of this Court's holding in *Farmer*, the instant verdicts for both general and punitive damages cannot stand.

Petitioner would also call the Court's attention to the amount of the damages awarded to respondent in light of Justice Powell's admonition that:

We also repeat the state courts have the responsibility in cases of this kind to assure that the damages awarded are not excessive. *See, Linn vs. Plant Guard Workers*, 383 U.S. at 65-66. (*Id.*, 4267.)

Surely, damages of the amounts awarded respondent, particularly the punitive damages in the amount of \$500,000, show that this rule has been disobeyed.

CONCLUSION

The Judgment below appears to be a deliberate confrontation with the preemption decisions of this Court. In outright defiance of this Court's repeated declarations that a state court may exercise no jurisdiction over union conduct which is even "arguably" an unfair labor practice under the Act, the Court of Appeal at one and the same time asserts jurisdiction over petitioner's conduct and holds that special jury findings compelling the conclusion that an unfair labor practice has been committed were supported by substantial evidence. Petitioner submits that the Opinion contains an irreconcilable internal inconsistency which can only be resolved by a finding of federal preemption.

A state court decision thus according supremacy to the state over federal law is at war with the mandate of the supremacy clause that federal law shall be accorded the sovereign rank throughout the United States. Such a decision cannot survive as it will continue to breed litigation in derogation of federal law; litigation until now stilled by the federal preemption and supremacy standards. Especially must a state decision in defiance of the supremacy clause be reversed, when, as here, the Court of Appeal has presumed to impose state jurisdiction on an activity which Congress has regulated by uniform national policy, in this case, union conduct regulated in the Act. The Act is "of course the law of the land which no state law can modify or repeal," *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235, 238 (1967), "[a] national system for the implementation of this country's labor policies * * *," *id.*, at 239, and, in addition, prescribing a "centralized administration of specially designed procedures [which Congress considered] was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies," *Garner v. Teamsters' Union*, 346 U.S. 485, 490 (1953), a national system in which ". . . Congress has expressed its judgment in favor of uniformity." *Guss v. Utah Labor Board*, 353 U.S. 1, 10-11 (1957).

The decision of the Court of Appeal does precisely what Congress and this Court have forbidden. It is a step toward different labor policies and labor laws being enforced throughout the land, emanating from the varying local attitudes towards labor controversies, thwarting uniform administration and enforcement of the national system for the implementation of this country's labor policies.

Twenty-one years ago, California sought to secede from that national system in *Garmon* and was twice rebuffed by this Court. California here again seeks to secede from that national system. This attempt at secession must likewise be blocked by this Court.

For the reasons stated herein, this Petition should be granted and the judgment and decision of the Court of Appeal below be summarily reversed.

Dated: March 24, 1977.

Respectfully submitted,

COOPER, WHITE & COOPER
CHARLES W. KENADY
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Attorneys for Petitioner

Appendix A
NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal of the State of California
First Appellate District, Division Three

1 Civil 37878
(Sup. Ct. No. 603623)

Filed
Oct. 20, 1976
Court of
Appeal
First App.
Dist.
Clifford C.
Porter, Clerk
By
Deputy

Joseph A. Cannata, Plaintiff and Respondent, vs. Allstate Insurance Company, Defendant an Appellant.	}
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Allstate Insurance Company appeals from a judgment after trial by jury in favor of Joseph A. Cannata, in the sum of \$150,000 compensatory damages and \$500,000 punitive damages.

1. The threshold issue to be determined here is whether the trial court lacked jurisdiction because of federal preemption under the Labor Management Relations Act. (29 U.S.C., § 141 et seq.)

Cannata by his complaint sought to recover damages for the wrongful termination of his employment with Allstate. Four causes of action were pled, two based upon breach of an alleged oral contract and two for fraudulent misrepre-

sentation. The complaint set forth in some detail the factual bases upon which Cannata relied in support of his allegation of wrongful termination of his employment. The general thrust of the complaint was that he was terminated for criticizing what he believed to be the immoral and unethical policies of Allstate as they related to Cannata's work as an insurance claims adjuster. None of the allegations made reference to any conduct relating to unionization activities by Cannata, nor was there an allegation that he was terminated for his pro-union philosophy or activities.

In his opening statement, the attorney for Cannata made reference to possible evidence of Cannata's pro-union activities and stated, "perhaps this is one of the reasons they decided to get rid of him." Evidence was introduced that Cannata, while an Allstate employee, voiced approval of union organization and criticized Allstate's non-union policy. He once invited other adjusters to a meeting to discuss the possibility of organizing a union among the claims adjusters. There is also evidence that he was discouraged by his employer in such activities. A substantial portion of the testimony regarding unions came from Allstate officials, who tried to explain Allstate's policy. The policy was that Allstate was not anti-union, but when employees talked about unionization, the management wanted to know so that they could correct the alleged deficiencies that inspired the unionization talk. The testimony of several witnesses, including Cannata, regarding Cannata's union activities and Allstate's policies regarding unions, that is, the total reference to unions in the record, appears on less than 125 pages of a total reporter's transcript of 2,538 pages. Two out of 75 documents placed in evidence have some reference to Cannata's union discussions. Mention was made briefly by counsel for both parties, in their opening statements and closing arguments, of Cannata's unionization activities and Allstate's reaction thereto.

The thrust of Allstate's defense was that Cannata was terminated for disloyalty to the company by being critical of its valid policies and, generally, because Cannata did not have the right attitude. One Allstate official (Keller Potter), under questioning by Allstate's attorney, testified that a supervisory employee like Cannata, who did not report unionization talk by fellow employees, would be considered disloyal and such would be, at least in part, sufficient grounds for termination.

The jury made two special findings upon which Allstate relies in asserting its contention that the state court lacked jurisdiction. Those findings are as follows:

- "1. We find the plaintiff, JOSEPH A. CANNATA, when he was terminated by Defendant, ALLSTATE INSURANCE COMPANY, a corporation, held a position as a:

Managerial employee	<input type="checkbox"/>
Non-Managerial employee	<input checked="" type="checkbox"/>
- "2. Were pro-union activity or statements a material factor in the termination of Plaintiff, JOSEPH A. CANNATA, by Defendant, ALLSTATE INSURANCE COMPANY, a corporation:

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No."
---	-------------------------------

On the basis of these special findings, appellant Allstate contends that Cannata's discharge was *arguably an unfair labor practice* within the meaning of the Labor Management Relations Act (Act), and that the trial court therefore was without jurisdiction. It is asserted that exclusive jurisdiction rested in the National Labor Relations Board (NLRB). Reliance is placed primarily upon the United States Supreme Court decision in *San Diego Unions v. Garmon* (1959) 359 U.S. 236.

Respondent argues that the special findings of the jury do not establish an unfair labor practice such as to preempt

state jurisdiction, and that there is no evidence to support the claim that Cannata's discharge was an unfair labor practice within the meaning of the Act. In addition, respondent contends that the issue should have been raised prior to trial, by demurrer or by petition for removal to federal court. Questions of subject matter jurisdiction are never waived and may be raised at any stage of the proceedings, even on appeal. The very nature of subject matter jurisdiction is such that it cannot be conferred by consent, waiver or estoppel. (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 721; *Russell v. Electrical Workers Local 569* (1966) 64 Cal.2d 22; 1 Witkin, Cal. Procedure (2d ed. 1970) Jurisdiction, § 10, pp. 534-535, and cases there cited.) Hence, it may be concluded that the jurisdictional issue raised by appellant is properly cognizable by this court on appeal.

We first examine the effect of the special finding. Special interrogatories to a jury are permitted at the discretion of the trial court. Where a special finding of fact is inconsistent with the general verdict, the former controls the latter. (Code Civ. Proc., § 625.) The purpose of the special interrogatory is to test the validity of the general verdict by determining whether all facts essential to support the general verdict were established to the satisfaction of the jury. (4 Witkin, Cal. Procedure (2d ed. 1970) Trial, § 266, pp. 3074-3075.) Normally, a finding supported by substantial evidence will not be disturbed on appeal. This finding was supported by substantial evidence, as previously discussed. Here, however, the special finding is surplusage, and as such may be disregarded. (See 48 Cal.Jur.2d., Trial, § 252, p. 262.) Whether a court has jurisdiction of a particular cause is a matter of law to be determined by the court. The court itself is vested with the jurisdiction to determine

its own jurisdiction. (1 Witkin, Cal. Procedure (2d ed. 1970) Jurisdiction, § 230 et seq., p. 767 et seq.) Any finding by a jury regarding the jurisdiction of a court is therefore necessarily surplusage, as that determination is within the exclusive province of the court. Since the special finding here is surplusage, it does not affect the general verdict. We must review the evidence to determine if the state court had jurisdiction.

It is now firmly established that the Act preempts both state and federal court jurisdiction to remedy conduct that is arguably prohibited or protected by the Act. (*Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 276; *Plumbers' Union v. Borden* (1963) 373 U.S. 690, 693-696; *San Diego Unions v. Garmon* (1969) 369 U.S. 236, 244-245; *Hill v. United Brotherhood of Carpenters etc. of America* (1975) 49 Cal.App.3d 614, 620, cert. granted 96 S.Ct. 876.) Sections 7 and 8 of the Act (29 U.S.C., §§ 157, 158) are broad provisions governing both protected "concerted activities" of employees and unfair labor practices on the part of employers.

In *San Diego Unions v. Garmon* (1958) 359 U.S. 236, the court stated (at pp. 244-245):

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. *But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.* What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, e.g., *Garner v. Teamsters Union*, 346 U.S. 485, especially at 489-491; *Weber v. Anheuser-Busch*,

Inc., 348 U.S. 468. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. (Emphasis added.)

The first inquiry in any case involving such a claim of federal preemption must be whether the conduct called into question may reasonably be asserted to be subject to NLRB cognizance. (*Plumbers' Union v. Borden, supra*, 373 U.S. 690, 694.) It is not necessary that the court determine whether the activity in question was federally protected or prohibited; it is sufficient to find that it is "reasonably arguable" that the matter comes within the Board's jurisdiction. (373 U.S. at p. 696.)

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to interfere with the formation or administration of any labor organization. Section 8(a)(3) prohibits discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

It has been held that interference with rights of employees to engage in concerted activities for the purpose of collec-

tive bargaining or other mutual aid and protection, including discharge of employees for the exercise of those rights, is an unfair labor practice. (*N.L.R.B. v. E. W. Buschman Co.* (6th Cir. 1967) 380 F.2d 255.)

There can be no question here that there is evidence that Allstate was at least *attempting to "chill"* the employee's right under section 7, *if not in fact interfere with that right* (emphasis added). The jurisdictional question, however, must be resolved by our evaluation of whether that part of Allstate's activity in this case was merely peripheral or was sufficient to make the case a "reasonably arguable" unfair labor practice case.

The pleadings did not alert the parties to the question of preemption. It appears that before trial the unionization issue surfaced, with the discovery by Allstate of a misfiled document regarding Cannata's termination that made reference to his unionization activities. However, during the trial the question of unionization activities received only minimal attention, as previously noted. The vast bulk of evidence in this case addressed itself to Allstate's claims policies, personnel policies, agreements with Cannata, and damages. We have no difficulty in holding that upon the evidence Cannata's unionization activities were merely peripheral to the case, and as such an insufficient basis for depriving the state court of jurisdiction. (Cf. *International Assn. of Machinists v. Gonzales* (1958) 356 U.S. 617; *Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1976) 17 Cal.3d 893, 901.) We cannot say from the total evidence that Cannata's discharge was arguably an unfair labor practice within the meaning of the Act, thereby depriving the state court of jurisdiction.

Cannata's assertion that he does not come within the protection of sections 7 and 8 of the Act because he was a supervisory employee, is without merit. Below, he urged that he was a non-management employee. The testimony of his superiors was that he was considered a non-management employee. Moreover, it has been held that state courts lack jurisdiction of a dispute despite the proposition that the plaintiff is a supervisor asserting exemption from the scope of the Board's jurisdiction if the presence of NLRB jurisdiction is arguable. (*Writers' Guild of America West, Inc. v. Superior Court* (1975) 53 Cal.App.3d 468, 474.) Respondent argues that the terms "managerial" and "non-managerial" as used in the special verdicts were ambiguous, that the word "supervisor" should have been used. However, the jury instruction defining the term "managerial employee" was in effect the definition of "supervisor" contained in the Act.

2. Appellant contends that the causes of action alleged in the complaint are barred by the statute of frauds. Prior to the court's instructing the jury, appellant withdrew its instructions on the statute of frauds defense. Respondent accordingly withdrew his proposed instructions relating to circumstances taking a case out of the statute of frauds, i.e., part performance and estoppel. Thus the issue of the statute of frauds and the related concepts of part performance and estoppel were never before the jury. Having withdrawn the defense at trial, appellant is precluded from raising it on appeal. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §§ 266-273, 276, pp. 4257-4262, 4264-4265.)

3. Appellant next contends that the admission of Cannata's testimony regarding Allstate's practices and policies in dealing with claims was prejudicial. The evidence was clearly relevant. (Evid. Code, §§ 350-351, 210; Witkin, Cal.

Evidence (2d ed. 1966) §§ 302-303, pp. 266-267.) The testimony complained of regarded alleged unlawful and unethical policies of Allstate which were the factual basis of the employment misrepresentation. We conclude that the trial court did not abuse its discretion in admitting such evidence. (Evid. Code, § 352.)

4. Appellant next contends that the court erred in denying its motions for nonsuit and a directed verdict as to the cause of action alleging malicious and fraudulent misrepresentation by Allstate that Cannata would fully participate in a profit-sharing pension fund when, in fact, it was company policy to terminate large numbers of employees who had just commenced participation or were shortly to participate in the program. Appellant urges that there was no evidence to support the cause of action. We indulge in every legitimate inference from the evidence in favor of respondent and disregard the contradicting evidence. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 353, pp. 3152-3153.) There was evidence that Allstate made efforts to terminate personnel over 50 years of age just as they commenced participation in the plan, and examples of involuntary termination of employees who were about to become eligible. This is substantial evidence to support the allegation.

5. Appellant further contends that the court's instructions as to fraud were erroneous. The instruction given is based upon Civil Code section 1572 and is substantially similar to that proposed by appellant. Instructions in the language of an applicable statute are properly given. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 201, p. 3019.) Furthermore, the jury was specifically instructed to determine "whether any statement that plaintiff would not be required to do anything which violated his conscience was

a statement of fact by Allstate or whether it was merely a statement of its opinion as to future occurrences at the time that it was made. If the statements were statements of opinion only and not of material fact, they cannot be a basis of liability for fraud." This is a proper instruction. (*Crandall v. Parks* (1908) 152 Cal. 772.)

6. Appellant contends that there is no substantial evidence that Allstate personnel had authority to grant Cannata "non-terminable" employment. The evidence offered, however, and apparently accepted by the jury, was that Cannata was offered employment until retirement at age 62 or 63, on condition that he follow the lawful directions of his superiors and that he would be given notice so that he might improve his performance if his job became in jeopardy. Judson Branch, the President of Allstate, testified that whatever "commitments Allstate would make to a new employee, the person who hired him and interviewed him in the claims department would have the authority to make those commitments." Keller Potter, Allstate regional manager, testified to substantially the same effect. There was clear actual authority to make the employment representations alleged to have been made. The jury obviously accepted Cannata's account of the facts, and its determination must be upheld on appeal. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

7. Appellant next contends that the damages awarded are excessive as a matter of law. It is argued that the award of compensatory damages is unsupported by the evidence and was based upon speculation and conjecture. Similar arguments were set forth by appellant in support of its motion for new trial, which was denied by the lower court. The primary duty to scrutinize the jury's verdict rests on the trial court, which is necessarily more familiar

with the evidence than the appellate court. Thus, while the trial court's determination is not binding upon a reviewing court, the granting or denying of a new trial on the basis of excessive damages is generally upheld. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.)

Dr. Robert Miller, an economist called as an expert witness by respondent, testified to Cannata's compromised future earnings as a result of his termination. Dr. Miller gave his opinion of the amounts respondent could have expected to accumulate, in wages and pension, had he stayed with Allstate and attained the position of regional claims manager (the position both parties concede Cannata would have had to attain to support the jury's compensation damage determination). Dr. Miller then computed the amounts respondent would probably earn in his current job with the Environmental Protection Agency.

There was ample evidence from which the jury could infer that respondent would have been promoted had he not been terminated. A performance evaluation by McGeachy in 1962 that Cannata "has the ability to advance far in claims work"; a personnel record note in 1962 that Cannata "shows potential for advancement"; a performance evaluation in 1966 that Cannata "has the ability to join the management group"; Regional Manager Potter's letter in 1966 that "Cannata will be ready for DSO Manager by July, 1967"; an employee salary review report in 1967 that Cannata is "deserving of this merit increase because of his continued high performance" and that he has "the potential for advancement to a higher position," are ample evidence to support an implied finding of promotability and negate the allegation that the verdict was based on conjecture. The reviewing court must uphold an award of damages whenever possible, and all presumptions are in

favor of the judgment. (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 61.)

8. As its final assignment of error, appellant contends that there was insufficient evidence of fraud to support an award of punitive damages, and that the jury's verdict was "motivated by antipathy for Allstate and its claims practices."

It is well settled that there is no fixed standard by which punitive damages can be determined, and both the award and the amount thereof are left to the discretion of the jury, upon a consideration of all the circumstances, subject to the general rule that the award will be rejected if it is without support in the evidence. (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 867, p. 3155.) Viewing the facts in a light most favorable to the judgment, it appears from the record that there was sufficient evidence upon which to base a finding of fraud. (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 65.) The amount of the award, though substantial, is not disproportionate to the compensatory damage award.

Judgment is affirmed.

Scott, J.

We concur:

Draper, P. J.

Brown (H. C.), J.

Appendix B

Court of Appeal of the State of California
In and for the
First Appellate District

DIVISION THREE

No. 37878
(Sup. Ct. No. 603623)

Joseph A. Cannata,	}
Plaintiff,	
vs.	
Allstate Insurance Company,	}
Defendant.	

BY THE COURT:

The petition for rehearing is hereby denied.

Dated Nov. 19, 1976

DRAPER, P. J.

Appendix
Appendix C

ORDER DENYING HEARING

After Judgment By the Court of Appeal
1st District, Division 3, Civil No. 37878

In the Supreme Court of the State of California
IN BANK

Cannata

v.

Allstate Insurance Company

Supreme Court Filed

Dec. 29, 1976

G. E. BISHEL, Clerk

Appellant's petition for hearing **DENIED.**

McComb, J., Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

WRIGHT

Chief Justice

MAY 18 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY, *Petitioner,*

v.

JOSEPH A. CANNATA, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals
of the State of California, First Appellate District,
Division Three

RESPONDENT'S BRIEF IN OPPOSITION

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May 18, 1977

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY, *Petitioner*,

v.

JOSEPH A. CANNATA, *Respondent*.

On Petition for a Writ of Certiorari to the Court of Appeals
of the State of California, First Appellate District,
Division Three

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Joseph A. Cannata respectfully suggests that certiorari be denied in this proceeding for the reason that the totality of circumstances disclosed by the record fails to support the questions tendered in the petition for certiorari. Cf. *Baldonado v. California*, 366 U.S. 417 (1961).

QUESTION PRESENTED

The sole question now relevant is whether the record of the trial and appellate proceedings in the California courts permits this Court to entertain or resolve the two federal pre-emption questions presented by the petition for certiorari.

RESTATEMENT OF THE CASE

Neither the opinion below nor the petition for certiorari gives a complete accounting of how this case arose. And the petition most certainly does not accurately reflect the desperate and belated attempt of the petitioner Allstate—after all had been lost at the jury trial—to reconstruct the case as if it had been a federal pre-emption matter from the start.

For the convenience of the Court, the relevant history of this prolonged litigation is annexed as an appendix to this brief, p. 1a, *infra*. The critical elements of this story of a post-trial attempt to create a federal pre-emption issue may be summarized as follows:

(1) In 1968, petitioner Allstate summarily terminated the employment of the respondent Cannata as a claims adjuster and supervisor. It did so on the sole stated ground that Cannata had repeatedly criticized Allstate's claims practices and underwriting procedures, which Cannata considered to be immoral and unethical. Allstate deemed such criticisms to be indicative of Cannata's "negative attitude" and "disloyalty" toward his employer.

(2) The record is barren of any evidence that the termination was in any way motivated by any pro-union activities or statements on the part of Cannata. Most certainly, at the time of the discharge in 1968, Cannata

was not told that any pro-union proclivities he might have had were among the reasons for termination. And Allstate's own memorandum of the termination interview confirms that termination was due solely to the reports of his negative and disloyal attitudes toward the claims practices and underwriting procedures.¹

(3) Cannata brought this action in 1969 in the California state courts, alleging two causes of action for breach of oral contract and two for fraudulent misrepresentations about the conditions of employment. No allegations appeared in the complaint concerning union activity by Cannata, and none was asserted as a defense in the Allstate answer. While Allstate made various pretrial motions, at no time did it move or claim that the state court's jurisdiction over Cannata's action was pre-empted by the National Labor Relations Act.

(4) Extensive pretrial discovery, which extended over the ensuing five years, produced no evidence or claim that union activities or sentiments had been involved in any way in the 1968 decision to terminate Cannata's employment. Not until four days before the trial commenced in August of 1974 did the unionization matter first surface. At that point, as the opinion below notes (Pet. App. 7), Allstate suddenly discovered and produced a "misfiled document" that made rather obscure reference to Cannata's interest "in organiz-

¹ Whatever evidence was later introduced at the trial as to Cannata's pro-union sympathies was not shown to have played any role in his termination in 1968. Indeed, in his closing argument to the jury (p. 159), Allstate's counsel admitted that some of this evidence "probably was not actually known to the employer" at the time of the discharge.

ing” and to Cannata’s brother being “a union organizer for unknown group.” While this belatedly produced document was introduced as an exhibit at the trial, it was never shown to have been a factor in the decision to discharge Cannata.²

(5) Just before the commencement of the trial, counsel for both parties advised the trial judge of the discovery of this “misfiled document” and of its effect upon the evidence about to be produced. Cannata’s counsel expressed concern that the sudden production of this document, said to have been misfiled for nearly seven years and then accidentally uncovered, indicated that Allstate was about to produce some semblance of evidence that Cannata may have been discharged for “union activities or at least being favorable to a union.” But Allstate’s counsel responded that it would be Allstate’s case “that he was discharged for being less than a faithful employee. . . . and that he persistently refused to follow our suggestions that he direct his criticisms of those things he wished to criticize through proper channels.” And, under Allstate’s theory of the case as explained to the jury, any evidence about Cannata’s union sympathies would relate to Allstate’s conception of a loyal supervisor as being one who reported employee dissatisfactions to management

² This reference to Cannata and unions was contained in two short sentences, which were part of a handwritten four-page document. The author of the document, who was Allstate’s home office personnel director, admitted that this information had come to him from a Mr. Kelly, who apparently got the information in turn from a Mr. Weidel. The director himself had no first hand knowledge of the matter. R.T. XIV, 1570. The petition for certiorari alludes to this information at page 4, but seemingly ascribes no great significance to it.

rather than “discussing unions and union organization with other employees.”

(6) As the opinion below notes (Pet. App. 3), the entire thrust of Allstate’s defense at the trial “was that Cannata was terminated for disloyalty to the company by being critical of its valid policies and, generally, because Cannata did not have the right attitude.” The opinion also notes (Pet. App. 7) that the “vast bulk of evidence in this case addressed itself to Allstate’s claims policies, personnel policies, agreements with Cannata, and damages.” The question of Cannata’s union sympathies, in the court’s words (Pet. App. 7), “received only minimal attention”—the trial references to unions appearing on less than 125 of the 2,538 pages of transcript (Pet. App. 2). And even the slight attention paid this matter was always in the context of Allstate’s concepts of loyalty and disloyalty, i.e., that the loyal supervisor will report employee dissatisfaction and employee discussion of unions rather than engage himself in union-related discussions.

(7) There were, to be sure, a few references in the trial record to Cannata’s interest in unions and to his speculation upon whether unionism was going to take hold in the insurance industry or among claims adjusters. Cannata himself testified only that he was in general sympathy with unions, if someone asked him, R.T. XIV, 1470. But these references were not introduced to show that Cannata himself had engaged in any concerted union activity, and indeed there was no evidence whatever of any affirmative pro-union activity on Cannata’s part. At most, there were a few isolated expressions of pro-union sympathy. More importantly, however, there was no attempt by Allstate at the

trial to tie these few oral expressions to the grounds for his termination in 1968.³

(8) To bolster its theory at the trial that Cannata, as a managerial supervisor, was “disloyal” in failing, among other reasons, to report discussions of unionism among Allstate’s employees and the causes for employee dissatisfaction, Allstate obtained two special jury findings, though not in the form originally sought:

(a) *Whether Cannata, at the time of the termination, was a managerial or non-managerial employee.* Had the jury found he was a managerial employee, the jury would have indicated agreement with Allstate’s attempt to portray Cannata as a disloyal supervisor. But the finding that he was a non-managerial employee was further evidence of the jury’s repudiation—expressed by its general verdict—of all aspects of Allstate’s disloyalty concept, particularly that which was rooted in its notion of the reporting duties of managerial supervisors.⁴

³ The opinion below at one point (Pet. App. 2) refers to an incident where Cannata “once invited other adjusters to a meeting to discuss the possibility of organizing a union among the claims adjusters.” But the record shows that this meeting occurred in another adjuster’s home in 1964, more than four years before the termination, and that the discussion was nothing more than speculation as to whether unionism was going to take hold among insurance companies. R.T. XIV, 1468-1469, 1478. Allstate’s counsel conceded at the trial that this meeting had not been brought to Allstate’s attention until the trial in 1974; hence it could have played no role in causing Cannata’s discharge.

⁴ Among the jury instructions was the charge that the “expression and encouragement of pro-union sentiments by such a managerial employee in disregard of the employer’s wishes or directions in that respect may constitute a breach of an employee’s duty to the employer.” Moreover, throughout the trial, Allstate urged that Cannata was a supervisor and thus “outside the scope of the NLRB.” R.T. Vol. I, 53.

(b) *Whether “pro-union activity or statements” were “a material factor in the termination of employment” of Cannata.* This ambiguous question can be interpreted and read in two ways, as referring (1) to the activity or statements of Cannata himself, or (2) to the activity or statements of other employees which Cannata should have reported. The affirmative answer given by the jury, which was to become the fulcrum of Allstate’s post-trial pre-emption argument, may well have reflected the jury’s choice of the second reading of the question. The jury’s answer thus would become the jury’s way of saying that Cannata’s failure to report “pro-union activity or statements” of other employees was a material but totally unjustified factor in the termination. The reasonableness of that interpretation of the question, and the answer, is shown by the fact that Allstate put this question to the jury in the context of its trial theory that Cannata had disloyally failed, as a managerial supervisor, to report the pro-union sentiments of other employees and to report the causes of their dissatisfaction that underlay their pro-union expressions. Moreover, since Allstate had not put forth any kind of a pre-emption defense at the trial, the question could not have been put to the jury in support of any defense theory that Cannata was discharged for having exercised his rights under Section 7 of the National Labor Relations Act.

(9) After the jury had found in Cannata’s favor and determined that he was entitled to substantial damages for Allstate’s breach of the contract and its flagrant and fraudulent misrepresentations, Allstate began to shift its entire theory of the case. In its motion for a new trial, Allstate for the first time made the claim that one of the “reasons” for terminating

Cannata had been his so-called "advocacy of union organization." Prime reliance was now placed on the jury's special finding that pro-union statements had been a material factor in the discharge. And it was in this post-trial motion that Allstate originated its argument that the state court's jurisdiction over the case was pre-empted, since discharge of an employee for pro-union activity or statements is arguably subject to the National Labor Relations Act.

(10) While this belated pre-emption point was only one of some ten grounds of Allstate's appeal from the jury's verdict, the pre-emption arguments were escalated at each stage of the state appellate proceedings. The culmination of this pre-emption afterthought is exhibited in the petition for certiorari filed by Allstate in this Court. Totally ignoring the other bases of the lower court's affirmance of the judgment (see Pet. App. 8-12), Allstate now condemns itself as an employer who discharged an employee in 1968 because of his pro-union activity and statements. That exercise in self-flagellation is traceable solely to an exploitation of a 1974 jury finding, which is said to reveal what neither party knew in 1968—i.e., that the termination was in material part due to a federally proscribed employment discrimination. And the refusal of the California courts to accept this post-rationalization of counsel is viewed (Pet. 25) as an effort by California once again "to secede from that national system in *Garmon*."

REASONS WHY THE WRIT SHOULD BE DENIED

The totality of circumstances revealed by the record demonstrates the inappropriateness of granting certiorari. This is simply not a labor pre-emption case; and

no amount of piecing together certain remarks in the opinion below and the special finding of the jury—as petitioner has attempted to do—can fill the factual void that surrounds the pre-emption questions posed in the petition for certiorari.

1. There Is No Evidence in This Case that Cannata Was Discharged for Having Engaged in Any Concerted Activity Within the Scope of the National Labor Relations Act. . . .

The voluminous record in this case makes it abundantly clear that Cannata's discharge was due solely to what Allstate considered to be his "negative attitude" and "disloyalty" with respect to Allstate's claims practices and underwriting procedures. There is not one item in the record to support Allstate's present contention that it terminated Cannata's employment in 1968 because of any pro-union statements on his part. Eloquent underlining the absence of such evidence is the fact that Allstate's attempt to rely on those pro-union statements never surfaced until after the trial—six years after the termination.

Even those statements, if they be accorded any significance, do not rise to the federal level of constituting "substantial evidence in the record showing that the employee was engaged in concerted activity for the purpose of mutual aid and protection and that the employer had some knowledge of this at the time of discharge." *N.L.R.B. v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717 (C.A. 5, 1973). Cannata's few and isolated pro-union remarks, leaving aside their hearsay nature, "can properly be classified as individual griping or complaining," *id.*, outside the scope of federally protected employee rights under § 7 of the National Labor Relations Act. Indeed, the evidence is conclu-

sive that Allstate, at least when the evidence surfaced at the trial, viewed Cannata's remarks only as further evidence of Cannata's "disloyalty" to his employer; under that strange "disloyalty" policy, Cannata as a supervisor was to report the dissatisfaction underlying anyone's talk about unions and not engage in any union discussion himself.

The court below perceived this fatal flaw in Allstate's belated pre-emption argument. After reviewing the entire record, it concluded that it could not say "that Cannata's discharge was arguably an unfair labor practice within the meaning of the Act, thereby depriving the state court of jurisdiction." Pet. App. 7. That conclusion, which is premised on a thorough factual inquiry, need not be reviewed by this Court. The court below showed a total familiarity with the labor pre-emption doctrine, as exemplified in the decisions of this Court. It simply found the evidence in this case inadequate to support application of the established pre-emption principle.⁵

2. The Jury's Special Finding that Pro-union Activity or Statements Were "a Material Factor" in His Termination Does Not Detract from the Totally Factual Nature of This Case.

The petition for certiorari is structured in large part upon the jury's special finding, sought by Allstate, that "pro-union activity or statements" were "a material factor in the termination" of Cannata. The petitioner adds to that finding certain remarks in the opinion below (a) that this finding "was supported by substantial evidence" (Pet. App. 4), and (b) that there was evidence "that Allstate was at least attempting to

⁵ As Mr. Justice Holmes succinctly said for the Court, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

'chill' the employee's right under section 7, if not in fact interfere with that right" (Pet. App. 7). From those elements, Allstate continues its post-trial argument that Cannata's discharge was arguably an unfair labor practice within the meaning of the federal labor statute.

That argument, however, misconceives the nature and the context of the special finding, as well as the limited sanction given the finding by the court below. Allstate requested this kind of finding to bolster its trial defense that Cannata was "disloyal" in not reporting union discussions and that, combined with the other major factors of "disloyalty" in the form of Cannata's vigorous criticisms of Allstate's claims practices and underwriting procedures, Cannata's termination was justified as a matter of company policy. In other words, the finding was not sought to support any claim—which had not been made at the time—that Cannata's discharge was arguably due to Allstate's distaste of Cannata's union sentiments.

The jury may well have thought that it was saying "yes" to whether Cannata's termination on grounds of "disloyalty" was due in material part to his failure to report to Allstate the "pro-union activity or statements" of other employees. Indeed, that was precisely part of the closing plea to the jury by Allstate's counsel, who urged that supervisors like Cannata "were required to report any indications of gripes which would lend themselves to . . . an organizing drive or sign-up of employees of Allstate in the union" (p. 157), and that certain evidence indicated that "Cannata had further information at this point of other union activities . . . and he should have mentioned them" (p. 162) to his supervisors.

The jury, in short, may well have thought that it was not being asked whether Cannata's own pro-union statements contributed materially to his discharge. If so, the finding is a totally inadequate base upon which to structure a federal pre-emption argument. Moreover, the rather ambiguous framing of the finding may well have misled the court below into searching for evidence to support what Allstate had never claimed at the trial—i.e., that Cannata's own pro-union sentiments contributed materially to his discharge. And this ambiguous finding may also have led the court below to search for evidence of still another claim never advanced by Allstate—i.e., a "chilling" by Allstate of Cannata's Section 7 rights.

At the same time, these broad but misguided references in the opinion below to employment discrimination and the chilling of Section 7 rights do not by themselves create the necessary factual climate for this Court's review of such matters. This Court "reviews judgments, not statements in opinions," *Black v. Cutter Laboratories, Inc.*, 351 U.S. 292, 297 (1956); and this Court's power "is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Thus it takes something more substantial than what appears in this record to justify any review by this Court of the colorful and broad language used by the court below in substantiating the special finding.⁶ In short, the record simply does not support those judicial statements. More importantly, the judgment

⁶ As was said in *Black v. Cutter Laboratories, Inc.*, 351 U.S. 292, 298 (1956), "At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests."

below does not rest upon those statements. The judgment was that the record as a whole, including the special finding, did not warrant the conclusion that "Cannata's discharge was arguably an unfair labor practice." Pet. App. 7.

The controversy about the meaning and effect of the special finding, and whether it was "surplusage," only emphasizes the essentially factual and therefore unreviewable nature of this case. What effect a state court gives to an ambiguous jury finding in the unique circumstances of this case does not create an issue of national significance, warranting the grant of certiorari.

And the lower court's ultimate conclusion that Cannata's pro-union sentiment was "peripheral to the case" does not rise above the factual parochialism of this case. The instant case simply presents an inappropriate vehicle for seeking further clarification, if any be needed, of the federal pre-emption doctrine. The court below recognized the limited significance of its own opinion, for it directed that the opinion not be published in the official reports. Pet. App. 1.

3. In Any Event, California Has Asserted No Interest Here that Interferes with the Paramount National Labor Policies.

The federal pre-emption doctrine is aimed only at state regulation of conduct "plainly within the central aim of federal regulation." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). If the activity regulated by the state is of "a merely peripheral concern" of the Labor Act, or touches interests so "deeply rooted in local feeling and responsibility" that only a compelling congressional direction can predominate, the pre-emption doctrine is inapplicable. *Id.*, at 243-244. And an assessment of whether

the national or state interests prevail "must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies." *Vaca v. Sipes*, 386 U.S. 171, 180 (1967).

On that basis, the correctness of the decision below is readily apparent. The national labor policies are in no way concerned or embarrassed if California permits a discharged insurance claims adjuster to recover damages for an egregious breach of an employment contract, compounded by flagrant and fraudulent misrepresentations that induced the employment contract. Particularly is that true where the termination is accompanied by no claims or overtones of union discrimination. See *Linn v. Plant Guard Workers*, 383 U.S. 53 (1965) (state libel action not pre-empted); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (state action for malicious and violent interference with lawful occupation not pre-empted); *Farmer v. United Brotherhood of Carpenters*, No. 75-804, 45 Law Week 4263 (1977) (state action for intentional infliction of emotional distress not pre-empted).

No provision of the National Labor Relations Act would have protected Cannata from his termination in 1968. There is no provision in Section 8 of that Act that makes it an unfair labor practice for Allstate to fraudulently induce the formation of an employment contract and then to unfairly breach that contract. Such a state cause of action, like the tort action in the *Farmer* case, is simply "unrelated to employment discrimination." 45 Law Week at 4267.

California, on the other hand, does have a substantial interest in protecting its citizens from the kind of abuse of which Cannata complained. See *Farmer*,

supra, 4266. That interest is no less worthy of protection because an employer like Allstate makes a belated claim long after the discharge that it was really guilty of employment discrimination. To permit an employer to rewrite its own termination history so as to escape the state court consequences of its illegal acts is to make a mockery of the federal pre-emption doctrine.

The decision below is thus eminently correct. The court found more than enough evidence to sustain the jury's verdict that Allstate improperly breached the contract and was guilty of massive "malicious and fraudulent misrepresentation," particularly with reference to Cannata's participation in Allstate's profit-sharing fund. The court also found that the award of damages, though substantial, was not disproportionate to the injuries suffered by Cannata. Those, of course, are matters beyond the review jurisdiction of this Court. But they may constitute sufficient nonfederal grounds to justify the result reached.

CONCLUSION

For these various reasons, certiorari should be denied.

Respectfully submitted,

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May 18, 1977

APPENDIX

APPENDIX**I****Statement of Facts**

In 1960, the Respondent, JOSEPH A. CANNATA, had an offer of employment pending with Lockheed Aircraft Company when he went to ALLSTATE seeking employment. (R.T. Vol. III, 180). He wanted job security and a company through which he could get into a pension plan to secure his financial future. (R.T. Vol. III, 181). He was sent to the Menlo Park Regional Office, where he was told that ALLSTATE was in need of honest, ambitious, capable, hard working individuals and that if he came to work for them he would have job security, that it would be a permanent position, that he could make his career with ALLSTATE and that he could stay with them until retirement if he followed its directions, all of which would be lawful and ethical because ALLSTATE was a very fair and ethical company. (R.T. Vol. III, 185). He was also told that if his job was ever in jeopardy, he would be given notice and a reasonable time to make up any deficiencies, and that ALLSTATE was very fair and abided by these personnel regulations. (R.T. Vol. III, 186). He was told that he could join the Savings and Profit Sharing Plan for Sears employees and thereby have an interest in the company. (R.T. Vol. III, 188). He was further told that Thomas J. Kelly, Assistant Claims Manager, would have the authority to make the commitment for ALLSTATE. (R.T. Vol. XV, 1661). Mr. Kelly told him that ALLSTATE was a fair and ethical company and that in all its relationships to its insureds and third-party claimants, it was fair and ethical. (R.T. Vol. III, 190). He told plaintiff that ALLSTATE made fair settlements and that the adjusters were to tell the claimants that they were to receive a fair settlement from ALLSTATE and that, therefore, there was no need to involve an attorney. (R.T. Vol. III, 193).

Thomas J. Kelly in his testimony recalled that he told CANNATA that ALLSTATE was looking for people who were ambitious, honest and interested in a career with Allstate—one who would be with ALLSTATE until he retired. (R.T. Vol. IX, 862, 865).

Mr. Kelly explained to CANNATA that he would be expected to conduct himself as a gentleman and be honest; that because the philosophy of ALLSTATE was to be fair to both their insured and their claimants he would never be asked to do anything that would be illegal or immoral. He was also told that, if he abided by the rules and regulations, to the effect that he be fair with the people he dealt with and things of that sort, he could expect to work out his working career with ALLSTATE (R.T. Vol. IX, 867, 868), and that as long as he was ethical and honest in performing his function, ALLSTATE felt he would have a career with it. (R.T. Vol. IX, 869).

At the time Mr. Kelly made the above statements to CANNATA, ALLSTATE's claims practices and procedures were not lawful and ethical (R.T. Vol. IX, 872, 873 and 874). Mr. Kelly further stated that a written memorandum was put out by Mr. Krieg's office (Western Zone Vice President) to the effect that if an employee was over 50 years old and was not promotable to the next grade, that efforts should be made to either phase him out or terminate him if possible. (R.T. Vol. IX, 879, 880)

ALLSTATE has a form of advertisements for recruiting employees prepared by its advertising agency in Chicago, approved by ALLSTATE management and then put in the Standard Practice Manual (R.T. Vol. XIII, 22-23) which reads, in part, as follows:

"ALLSTATE NEEDS MORE PEOPLE POWER . . . People who like success, but know success takes brains, ambition and a lot of hard work . . . if you are that kind of person, we'll pull out all the stops to get you where you

want to go. We don't believe in putting limits on opportunity . . . There is no ceiling on where you can go . . . An Allstate employee can expect to retire with a fat nest egg from Sears Profit Sharing." (R.T. Vol. XIII, 24, Exhibit No. 19).

The job of Casualty Claims Adjuster was offered to CANNATA and he accepted that job in consideration for, and in reliance on, the representations that were made to him concerning ALLSTATE, its policy, and what would be expected of him. He was told that the ALLSTATE mandatory retirement age was either 62 or 63 and therefore, at that time, it was his intention to stay with ALLSTATE until he retired at either age 62 or 63. (R.T. Vol. III, 204, 205). He started work on October 3, 1960, at the San Francisco District Office where he spent his entire career with ALLSTATE. (R.T. Vol. III, 196) Within two years he was promoted to a Property Damage Examiner, but actually functioned as a Casualty Claims Examiner. (R.T. Vol. III, 197). In 1965, he was promoted to Casualty Claims Supervisor, after which he had an average of 1 to 3 people working for him. He stayed in that position until he was terminated on May 21, 1968. (R.T. Vol. III, 203).

CANNATA was never told by anyone that if he criticized ALLSTATE policies he would be in danger of losing his job. He felt free to criticize those policies that he thought to be wrong or unethical. One policy that he criticized strongly was the "OOPS" program, or the out-of-pocket expense system. (R.T. Vol. III, 213). Under this program, the adjuster was instructed to determine the "out-of-pocket" loss, and convey to the claimant that this loss was all he was "entitled to". (R.T. Vol. III, 212-217). He criticized this policy because the ALLSTATE adjuster was put into the position of having to lie and misrepresent both the law and the facts to the claimant or the insured. (R.T. Vol. III, 222).

CANNATA also criticized the policy used to dissuade a claimant from seeing an attorney. The adjusters would be instructed to "contact claimant fast and control him". He was critical of this because it was in direct violation of the provisions of the 'Statement of Principles on Respective Rights and Duties of Lawyers, Insurance Companies and Adjusters Relating to the Business of Adjusting Insurance Claims', adopted January 8, 1939. (R.T. Vol. III, 236, 237, 238)

CANNATA also criticized ALLSTATE's policy concerning the failure to pay policy limits in admitted liability cases. (R.T. Vol. IV, 265). (R.T. Vol. IV, 264). He objected to this practice because it constituted bad faith. (R.T. Vol. IV, 266). He also felt it was misrepresentation, because ALLSTATE assured their insureds that it was looking out for their interests when it wasn't—it was just looking out for ALLSTATE's interest. (R.T. Vol. IV, 267).

Another policy of ALLSTATE which he criticized was that where, when ALLSTATE knew the claim was worth more than the policy limits, it would notify its attorney not to inform them of such fact in writing. (R.T. Vol. IV, 270-272). In one instance, ALLSTATE told its attorney to tear up his file copy of such a letter, CANNATA criticized this policy to his superiors because it was destructive of the opinion of the attorney who was supposed to be representing the insured. (R.T. Vol. IV, 273).

CANNATA criticized ALLSTATE's policy of purposely stalling and procrastinating in the payment of medical pay coverage to its insured. His superiors told him that the purpose of this (R.T. Vol. IV, 276, 277) was to put the insured in an economic bind so that he would be more apt to settle his claim and to discourage him from carrying on his medical treatment because of the economic bind he was in. (R.T. Vol. IV, 282, 283).

Another ALLSTATE claims policy which was criticized, (R.T. Vol. IV, 86), was the hiring of a private investigating

firm like Retail Credit Company or Kraut and Schneider in order to make direct contact with a claimant represented by an attorney, when ALLSTATE was barred from making such contact by the "Statement of Principles, etc." (R.T. Vol. IV, 284, 285).

CANNATA was also critical of the practice of ALLSTATE which allowed another insurance company to review the files of ALLSTATE insureds without the insured's permission. This policy was reaffirmed at various times. (R.T. Vol. IV, 297, 298).

CANNATA also criticized Allstate's policy concerning the claim by an insured for damage to his automobile under the collision portion of his policy with ALLSTATE, (R.T. Vol. IV, 302), where the insured was required to go to a certain shop from which ALLSTATE demanded a discount in return for a volume of business. (R.T. Vol. IV, 302, 303)

CANNATA was also critical of the ALLSTATE policy of paying less than an insured was entitled to in the case of the total loss to the automobile of one of its insureds. (R.T. Vol. IV, 310).

CANNATA's Personnel File contained the following references to his criticism of ALLSTATE policies together with recommendations that he be terminated for such criticism:

(1) In a letter, dated April 10, 1967, from J. R. Crise, Menlo Park Regional Claims Manager:

"As you know, we have had a serious attitude problem with this Supervisor for a long period of time. He expressed complete disapproval with our entire Severity Control Program at the last in-depth survey in January of this year. He continued to express this disapproval even after conferences with him by the Casualty Director and his Claims Superintendent . . .".

We cannot tolerate this kind of attitude by a Supervisor. It has a bad effect not only on his fellow super-

visors, but all of the adjusters in the office. I feel this has been discussed with him a sufficient number of times that no further discussion is necessary, and I recommend that we terminate this man immediately." (R.T. Vol. IV, 353, 354, Exhibit 5S).

The Severity Control Program is all of the policies and practices that ALLSTATE had for limiting the amount of money they would pay on claims and takes in all of the policies that plaintiff criticized. (R.T. Vol. IV, 355).

(2) In a Performance Evaluation on October 12, 1967:

"... Joe will comply with company and regional company policy and procedures, but at times does not accept these principles and in turn cannot, or does not, sell them to his adjusters. On the other hand, if Joe is sold on these ideas, or accepts them himself, he can, and does, relate them effectively to his people ... (R.T. Vol. V, Exhibit 5V).

(3) In a letter, dated October 13, 1967, from J. R. Crise:

"On October 12, Tom Payton and I conducted a Performance Evaluation on Casualty Supervisor, Joe Cannata, along the lines discussed by you, myself and Larry Williford ...

... Tom then interjected that the reason he was rated in this category was because we sometimes got the impression that he would not sell his adjusters on Company policy in which he did not believe. He said that he would sell his men and did sell his men on everything we asked him to do. I then told him that I had read his complete file and that all throughout the file I saw the same point that Tom had just brought up. Joe then said that he would not say anything behind my back that he would not say to my face and that he was just more honest than the other supervisors who professed 100% cooperation but then said something else when

management was not there. He said maybe he was just stupid in being so honest, but he realized he had gotten a reputation as being a rebel for stating his honest feelings."

(4) In a letter, dated April 29, 1968, from J. R. Crise:

"I am enclosing a copy of a memorandum concerning Joe Cannata's recent conduct in the San Francisco office. As you know, when Chuck Kersgard recently visited San Francisco, he was verbally attacked by Cannata. Joe ridiculed all of our Company policies and *particularly those involving severity control*.

Despite his professed acceptance of Company policy when I was present at his performance evaluation last year, he really has not accepted anything ... I feel that much of the adjuster's bad feeling toward Regional Management stems from this supervisor's extremely poor attitude. It is difficult to find enough competency in the technical aspect of his performance to warrant termination. However, in view of this continued attitude problem, and as shown by Tom Payton's 4-26 memorandum, utter disregard for his job, I recommend we terminate this man even if we have to give him six month's termination pay. I feel he is not salvageable and any further attempts through discussions with him will not change this man. He is a bad influence in the office and he is undermining everything we are attempting to accomplish." (R.T. Vol. V, 380, 831, Exhibit 5Y).

(5) In a letter, dated May 14, 1968 (seven days before his termination), from C. E. Kersgard, Sales Manager:

"It was at this point that Joe Cannata (who was sitting at a desk near the group) entered the conversation and expressed his views regarding the insurance industry and specifically the claim practices of the industry and Allstate. He further stated that the insurance companies and Allstate in particular were cheat-

ing claimants through the practice of offering quick settlements for specials and securing releases considerably below the value of the claim. I asked him to clarify this point and he did not hesitate to repeat that we were attempting to reduce our claim costs at the expense of the public and that we were not paying for pain and suffering, possible loss of wages, and other items because of our 'high pressure and fast action activities' on B.I. claims.

It became quite evident to me that this man had some strange ideas about the business and I was quite surprised to find that he supervised the handling of B.I. claims. Because of the nature of the conversation, I changed the subject and pursued individual discussions with the agents present.

Frankly, the attitude and the philosophy of this individual shocked me and made me wonder what effect this man might have on other people in the office—both claims and sales.

I feel you should be made aware of this incident for whatever action you deem necessary." (R.T. Vol. V, 389, 390, Exhibit 5AA).

(6) In a letter, dated May 17, 1968, from W. R. Brown, Zone Personnel Manager:

"We are returning your file on Joseph A. Cannata and approve your request for termination. We suggest that you and Jack Crise be personally involved in discussing the attitude incidents with Cannata so that he has no misunderstanding about the cause of this action. (R.T. Vol. V, 399, Exhibit 5BB).

(7) In the "Termination Interview" memorandum, dated May 21, 1968, (the date of plaintiff's termination when the reasons for his termination were stated to him), signed by J. R. Crise:

"... Tom Payton handled the termination interview. He reviewed Joe's performance in regard to his attitude both during the time Tom Payton has been District Claim Manager and his attitude under prior District Claim Managers. Tom reminded Joe that even as late as last Thursday, he had expressed disagreement with the findings of our April In Depth survey in the presence of Casualty Adjusters in the office. Joe was advised that his attitude and failure to accept Company policy and Severity Control measures was having an unfavorable influence in the office and unfavorably influencing not only the men Joe supervised, both other adjusters. It has now reached a point that he, Tom Payton, could no longer tolerate this and that we had all agreed that in the best interests of Joe's future and the Company, he be terminated effective today, May 21, 1968 ...

... I then told him that while he was a supervisor for Allstate Insurance Company the right of free speech did not extend to undermining our Severity Control programs and other policies even though he disagreed with them. Joe raised the issue that his attitude was not having an unfavorable effect on his technical performance nor the technical performance of his men. I told him that no doubt and unquestionably, it was influencing the performance not only of those men he supervised, but other men in the office. I also told him we had every right to choose whomever we wanted to supervise our employees and we chose not to have Joe Cannata do any further supervising because of his inability to accept and carry out wholeheartedly Company policies and Severity Control programs.

Mr. Potter reiterated to Joe that he was being terminated for his extremely negative attitude and his expressing of that attitude to the adjusters and others in the office."

At no time prior to the termination meeting of May 21, 1968, was Cannata given any warnings by anyone from ALLSTATE that his job was in jeopardy. (R.T. Vol. V, 401, 402). This was in violation of ALLSTATE's Personnel Regulations (R.T. Vol. VIII, 775), (R.T. Vol. XII, 1419) (R.T. Vol. VIII, 776-778), Exhibit No 12). Furthermore, there was an agreement between Mr. Potter, Mr. Crise and Mr. Payton that Cannata was not to be given any notice prior to the meeting that he was going to be terminated. (R.T. Vol. XV, 1715). Mr. Payton, who was told by his superiors to tell Cannata why he was being terminated (R.T. Vol. XVIII, 2037) told him that he was being terminated for his attitude and failure to accept company policy and Severity Control measures. (R.T. Vol. XVIII, 2083). They described "plaintiff's attitude," for which he was being terminated, as being his criticizing of the ALLSTATE claims practices and policies. (R.T. Vol. V, 403).

The sole reference to unions in the entire Personnel File is one paragraph in a letter written by J. R. Crise, on May 3, 1968, wherein he refers to a hearsay statement wherein plaintiff was quoted as saying to a fellow employee that he understood the union was getting a foothold, that there was a lot of talk about a union among claims men and that he thought it might do a lot of good to have one at ALLSTATE.

When he testified concerning this part of the letter at the trial Crise said that ALLSTATE *did not have any policy against the formation of a union among its employees*, (R.T. Vol. X, 1140), and that the only reason he incorporated it into the letter was because he thought the Regional Manager (to whom the letter was addressed) should be notified of it because if their employees were talking about a union, it was a clue that they had better get out and see what the problem might be. (R.T. Vol. X, 1139, 1140).

II

History of the Case

No union is a party to this action. There is no union, either directly or indirectly involved in this case, and CANNATA was not a member of any union during the time of his employment with ALLSTATE.

The complaint does not refer in any even remote way to any union, union activity and/or any anti-union activity and/or statements on the part of ALLSTATE, nor does it charge and/or allege that respondent was terminated from his employment for any so-called "union activity or statements."

Petitioner ALLSTATE never, at any time before the judgment was rendered against it, challenged the jurisdiction of the state court or filed any document and/or pleading which inferred or alleged that the state court had no jurisdiction and/or that its jurisdiction was pre-empted by the National Labor Relations Act, but, in fact, submitted to the jurisdiction of the court and even admitted that respondent "was outside the scope of the NLRB or any correlative state agency." (Infra. R.T. Vol. I, 53).

ALLSTATE never stated, alleged or claimed that CANNATA was terminated for any so-called "union activity or statements." Furthermore, it was not until after the judgment was rendered against it, that it even argued that so-called "pro-union activity or statements" were a material factor in plaintiff's termination.

On January 6, 1971, respondent filed and served on ALLSTATE, certain Interrogatories (CT 83) in which extensive questions (Interrogatories 107 through 126) were asked concerning any misconduct of plaintiff which ALLSTATE charged and which ALLSTATE alleged were the reasons for respondent's termination. In ALLSTATE's further answers

to interrogatories, Nos. 107 through 126 (CT 149) absolutely no mention was made of any "union activity," but instead the violation of his employment contract and the reasons for his termination were stated as follows:

"Plaintiff exhibited a continuing inability or unwillingness to understand and follow any Allstate claims handling and underwriting policies and procedures which he disagreed with. His attitude was one of reluctance and refusal to adopt such policies and procedures in his own work and develop and promote them in the work of those under his supervision."

Again, in ALLSTATE's "Supplemental Answers and Objections To Plaintiff's Second Set of Interrogatories" (CT 375), dated February 15, 1974, answering CANNATA's Interrogatory No. 108 asking for the reasons why CANNATA was terminated on May 21, 1968, ALLSTATE replied that the reasons given are "contained in the report of this interview which can be found in plaintiff's personnel file held by counsel." Again, no mention of unions or union activity.

Furthermore, in neither ALLSTATE's motion for partial summary judgment nor its motion for judgment on the pleadings (CT 476) nor in its memorandum in support thereof, heard on June 18, 1974, and denied by the court on August 1, 1974, was there any mention of CANNATA's yet unmentioned claim of "lack of jurisdiction" and/or "union activity." At the trial, ALLSTATE contended that CANNATA was *outside the scope of the National Labor Relations Act* as evidenced by the following statement of its attorney when, in preliminary argument on the law, he stated to the court:

"... We said at the outset, we are not concerned in this case with any statute protecting Mr. Cannata's rights. He was a supervisor, *he was outside the scope of the NLRB or any correlative state agency...*" (R.T. Vol. I, 53). (emphasis ours)

During the same preliminary argument to the court, ALLSTATE's attorney informed the court of the *reason* respondent was fired when he stated:

"But he was fired for criticizing his employer for instituting what he chose to call unlawful practices." (CT I, p. 53)

"... because I will state that the defendant will not tender as cause for this man's discharge the failure to follow any order relating to his employment, relating to the carrying out of the insurance activities of this company. *The plaintiff was fired because he declined repeatedly to follow the defendant's suggestion that he follow proper channels in making his criticism of those practices.*" (CT I, p. 57-58).

Furthermore, a reading of ALLSTATE's Trial Brief (CT 758) can leave no doubt that the sole reason ALLSTATE terminated respondent was his criticism of certain of ALLSTATE's claim practices and policies. After setting forth five of ALLSTATE's claims practices which it states respondent criticized, the brief states:

"With respect to most of the items, it was his position, repeatedly expressed and devoutly advocated, that the practices and procedures complained of were unlawful, immoral or unethical..."

"... Defendant contends plaintiff's constant disparagement of the practices constitutes good cause for discharge. Under the issues, the most that the jury will be called upon to determine is whether on the basis of the evidence, plaintiff's criticism constituted such disloyalty as to justify his termination..."

"... Plaintiff, Cannata, commencing in the third year of his employment and continuing for five years, pursued a course of constant criticism of Allstate's business policies and methods, with particular venom re-

served for Allstate's claims practices. Cannata's hostility was open, vocal and continuous . . ."

"... A short time after taking the job with Allstate, Cannata began to criticize company policy. His criticism ran to fellow employees, his superiors and their conduct, and to the philosophy of his company. His opposition was communicated to the very persons it was his responsibility to supervise and manage in the execution of such matters. He did not direct his views to those who would affect company policies or follow procedures for bringing his thoughts to their attention..."

"... The problem was recognized and brought to his attention. The need for corrective action was unequivocally conveyed. However, instead of the '100% cooperation' which he promised, Cannata continued to display his antagonism, culminating in the episode in March, 1968, when Cannata interrupted a conversation between sales agents and the visiting regional sales manager to express again his fundamental disagreements with company policies. Under the cases, Allstate had every justification for terminating him . . ." (CT 758).

In ALLSTATE's "Memorandum In Support Of Motion To Limit Evidence At Trial", it stated:

"Defendant on the other hand will be entitled to offer evidence showing that there was cause for termination. Its position on that score is that plaintiff's criticisms, by reason of their disparaging and discrediting nature, constituted a violation of his duty to his employer which warranted termination . . . it is probable that the introduction of evidence relating to Allstate's claim practices will confuse the issues . . . Defendant contends plaintiff's constant disparagement of the practices constitutes good cause for discharge. Under the issues, the

most that the jury will be called upon to determine is whether on the basis of the evidence, plaintiff's criticisms constituted such disloyalty as to justify his termination." (CT 749).

ALLSTATE did not tell CANNATA, or even infer, that any feeling of his concerning unions had anything to do with his termination. (R.T. V, 385). On the contrary, at the termination meeting, the ALLSTATE officials told Cannata that the "attitude" he was being terminated for was his criticism of the ALLSTATE claims practices and policies. (R.T. V, 403).

Even the official termination memorandum, made on the date of plaintiff's termination on May 21, 1968, and signed by Mr. J. R. Crise, Claim Manager, stated that respondent was being terminated for his "negative attitude and failure to accept company policy and severity control measures". (R.T. V, 400, 401) (Exhibit 5CC).

Mr. Payton, plaintiff's District Service Office Manager, testified that plaintiff was terminated for his "attitude and failure to accept company policy and severity control measures". (R.T. Vol. XVIII, 2038).

Mr. Potter, the Regional Manager, testified that plaintiff was fired for having an "extremely negative attitude" and that there was enough information recorded in plaintiff's personnel file to warrant termination. (R.T. Vol. XVI, 1708).

In spite of all of the foregoing, on Friday, August 2, 1974, four days before the commencement of the trial, ALLSTATE delivered to Cannata's counsel the four page document (R.T. XIV, Exhibit H) which an ALLSTATE employee stated she took from a file entitled "Menlo Park Regional Employees Relations File." (R.T. XIV, 1522). She allegedly just "happened" to find it in July, 1974, while looking for another document at the request of counsel for ALLSTATE (R.T. XIV, 1519). This file was in storage (R.T. XIV, 1522).

and contained most of the material concerning union activity in the zone, which was one of its purposes. (R.T. XIV, 1530).

This belatedly produced handwritten four page document (Exhibit H) has only one reference to CANNATA in connection with unions, which is as follows:

"Tom Kelly—Menlo—Tues. 1:00 P.M., 9/5/67 Chuck Weidel—2 people in S.F. Joe Cannata Sup?? Lou Gedge dispatch adj. would be interested in organizing. Cannata's brother is a union organizer for unknown group." (R.T. X, 1144).

ALLSTATE's home office Personnel Director, William Brown, who handwrote this note, admitted that this information came to him from Mr. Kelly, who apparently got this opinion from Mr. Weidel (R.T. XIV, 1569) and that he (Mr. Brown) has no personal or firsthand knowledge of the information. (R.T. XIV, 1570).

Other than attending a discussion in 1964 (four years prior to his termination) at another adjuster's house to discuss or to speculate upon whether unionism was going to take hold in the area amongst insurance companies (R.T. XIV, 1468-1469, 1478) (a fact ALLSTATE was never even aware of until the trial), plaintiff did nothing more than admit he was in general sympathy with unions if someone would ask him. (R.T. XIV, 1470). He never did anything of an affirmative nature nor engaged in any activity concerning the forming of any kind of a union at ALLSTATE. (R.T. XIV, 1470).

The pattern for ALLSTATE's appeal began to take form when in its "MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL", filed after the judgment, it alleged as one of its "reasons" for terminating CANNATA, his so-called "advocacy of union organization". Even then, it seemed to be only considered a secondary rea-

son by ALLSTATE. In its "Memorandum of Points and Authorities in Support of Motion for New Trial", ALLSTATE stated:

"... The evidence from both plaintiff and defendant was quite clear that plaintiff's termination was for persistent criticism representing in the employer's view a negative attitude and for advocacy of union organization of defendant's employee..."

"... The evidence presented at trial showed clearly that plaintiff continually criticized defendant and its policies, in total disregard of whether his conduct tended to undermine company programs and employee morale. He constantly accused the defendant of dishonesty, saying that the company cheated the public and its policy holders. Such statements were made in complete disregard of the presence of impressionable junior employees. This conduct interfered greatly with the operation of defendant's business and weakened the morale of the office in which plaintiff worked.

Plaintiff's conduct was a breach of his duty of faithful and loyal performance of his obligations under his contract of employment and furnished good cause to terminate plaintiff..." (CT 1036).

After the Court of Appeals had affirmed the judgment in favor of Cannata, and had denied ALLSTATE's Petition for Rehearing, and as its chance of disturbing the judgment were waning and appeared more remote, ALLSTATE, became more bold and reckless in its assertions and statements by asserting in its petition for a hearing in the California Supreme Court:

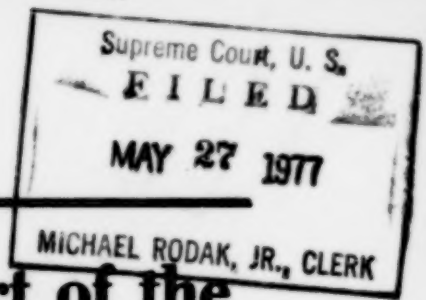
"A. Since Allstate's discharge of plaintiff was arguably an unfair labor practice, California's Jurisdiction is preempted" (Petition for Hearing, p. 7), and "Discharge for such activity is precisely what the jury

found . . ." (Petition for Hearing, p. 11), and "it is Allstate's conduct—discharging Cannata for pro-union activity—which triggers preemption". (Petition for Hearing, p. 15), and "Allstate's conduct in discharging plaintiff for pro-union activity was arguably an unfair labor practice" (Petition for Hearing, p. 16), and *finally the most brazen assertion*, "It shows that plaintiff was an open advocate of unionization of Allstate employees, that he took steps to further this objective, that Allstate knew of activities and statements in this regard and that Allstate, in large part, based its decision to discharge him on his pro-union activities and statements." (Petition for Hearing, p. 20)

In spite of ALLSTATE's bold assertions, the record reveals evidence of only one instance of CANNATA's conduct which might possibly be considered "pro-union activity". This came to light *for the first time in the testimony, during the trial*, of Edwin Francis, an ALLSTATE claims adjuster, who related an incident concerning an invitation by plaintiff to discuss a union. (R.T. Vol. XII, 1378-1382) (R.T. Vol. IV, 1468-1470). This occurred in 1964 (R.T. Vol. XIV, 1468) four years prior to plaintiff's termination. There is no evidence that ALLSTATE was aware of this incident during plaintiff's employment, as alluded to in the argument to the jury of ALLSTATE's attorney where he stated, "this particular reason probably was not actually known to the employer". (R.T. Vol. XIX, 159, lines 25-26).

The only other evidence relating CANNATA to "unions" was his criticism of ALLSTATE's policy of requiring ALLSTATE management employees to report union activity or statements; the testimony of ALLSTATE adjuster, Joseph Manning, at the trial, that CANNATA had stated to him that "he felt unions had done a great deal for people, generally, and particularly in the trades"; the testimony at the trial of ALLSTATE adjuster, Edwin Francis, that CANNATA had expressed an opinion "favoring unions"; a paragraph in a

four page document (Defendant's Exhibit "H") taken from the "Menlo Park Employee Relations File" stating that CANNATA "would be interested in organizing"; and one paragraph in one letter (Plaintiff's Exhibit 5-Z), taken from CANNATA's personnel file, relating in part to a statement made by him that he thought it might do a lot of good to have a union at ALLSTATE. There is no evidence that ALLSTATE was ever aware of anything testified to at the trial by ALLSTATE adjusters Joseph Manning and Edwin Francis.



In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY,
Petitioner,

VS.

JOSEPH A. CANNATA,
Respondent.

On Petition for a Writ of Certiorari
To the Court of Appeal of the State of California,
First Appellate District, Division Three

Petitioner's Reply to Respondent's Brief

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Petitioner's Reply to Respondent's Brief

INTRODUCTION

Preliminarily, petitioner wishes to criticize the Respondent's Brief in Opposition ("Respondent's Brief" or "Brief") in two respects. It contains a nineteen-page "Appendix" setting forth a "Statement of Facts" and a "History of the Case". Petitioner questions the propriety of this "Appendix" because it apparently was written in an attempt to convey an air of authenticity to its statement of the "facts" by interspersing numerous references to the record

below. However, neither party certified the record to this Court under the provisions of Rule 21 of the Supreme Court Rules. Thus, the Court is presented with a strongly argumentative version of the "facts" allegedly supported by transcript references, but *without the certified record* for purposes of verification by this Court. As will be pointed out in more detail below, several of respondent's "facts" are simply inaccurate. If respondent believed that his best means of opposing the petition was a comprehensive review of the evidence developed in the trial court, he should have certified the record to this Court for its objective inspection.

Secondly, among the referenced "facts" set forth in the Brief, there is material which appears to be directly and completely referenced to the record. But no citation is furnished for purposes of verification by the reader. See, for example, the quote attributed to Allstate's counsel appearing in the middle of page four of the Brief, as well as the alleged concession of Allstate's counsel appearing at the end of footnote three on page six.

It appears that respondent is attempting to create the illusion of a documented and fully referenced exposition of the facts in support of his opposition. Because of the absence of a certified record upon which verification of respondent's "facts" could be made, petitioner submits that the Appendix as well as those portions of the Brief relying thereon should be considered with caution.

I. THE LABOR ISSUE WAS TIMELY RAISED.

The theme of Respondent's Brief is that this is not a "labor case" and is therefore not subject to federal preemption. Respondent asserts that the labor issue did not appear until a few days before the trial (Respondent's Brief

p. 5) and that there was no evidence from which the jury could conclude that respondent was terminated for his pro-union activity or statements (Respondent's Brief p. 9). Finally, respondent accuses petitioner of suppressing the preemption issue until after judgment. In this connection, respondent tells this Court:

"Petitioner, Allstate, never at any time before the judgment was rendered against it, challenged the jurisdiction of the state court or filed any document and/or pleading which inferred or alleged that the state court had no jurisdiction and/or that its jurisdiction was pre-empted (sic) by the National Labor Relations Act, . . ." (Respondent's Brief, p. 11a)

Respondent supports these assertions with false statements and quotations taken from context, sometimes with and sometimes without citation to the record which respondent has failed to bring before this Court. Rather than burden the Court with an extended rebuttal of the inaccuracies and distortions contained in Respondent's Brief, petitioner will address each of its major points, demonstrating with references¹ that respondent has grossly misrepresented the record in an effort to defeat this petition.

A. The Labor Issue Was in the Case from the Outset.

Respondent's primary argument that this case is not pre-empted rests upon a claim that the labor issue was manufactured by the petitioner and was never urged until after judgment. This claim is false. Aside from approximately 125 pages of testimony of over one-third of the witnesses who testified at trial, including respondent, regarding "Can-

1. Although petitioner eschewed what it considered the improper practice of citing to a record without its certification, respondent's use of this device requires appropriate references to the record in response.

nata's union activities and Allstate's policies regarding unions" (Opinion, p. 2), there were two documents placed into evidence showing that petitioner was aware of respondent's pro-union activity and that it was a material factor in the decision to terminate him.

One document, showing petitioner's awareness of respondent's pro-union activity, was designated at trial as *Plaintiff's* Exhibit 5-Z. This exhibit was a letter dated May 3, 1968 from respondent's immediate supervisor, John Crise, to the Regional Manager, Keller Potter, recommending respondent's termination for an unsatisfactory attitude because, *inter alia*, he had suggested that a union "might do a lot of good" at Allstate. (Vol. X, 1139-1140) This letter, written only 18 days prior to respondent's termination, was authored by the supervisor who recommended the firing to the manager who approved it (Vol. V, p. 39, Exhibit 5BB). Moreover, both Crise and Potter were present at and participated in respondent's termination interview (Vol. V, pp. 400-401, Exhibit 5CC).

Equally absurd is respondent's assertion that this letter and the labor issue did not arise during pre-trial discovery. The Crise letter to Potter was a part of respondent's personnel file (Exhibit 5), which was made available to him and copied by his counsel long before trial. Furthermore, in pre-trial depositions respondent's counsel extensively examined witnesses, including John Crise and Clarence (Bud) Danen, about the letter and Cannata's pro-union activity. (Vol. X, p. 1139, 1140; Vol. XVI, 1701-1706, Deposition of John Crise, p. 26-29; Deposition of Clarence (Bud) Danen, p. 28-30). These depositions demonstrate that respondent knew about and took discovery on the Crise letter and the labor issue well *before* trial.

Another document evidencing petitioner's awareness of

respondent's pro-union activity and statements was a memorandum dated September, 1967 (approximately nine months before respondent's termination) reporting that Cannata "would be interested in organizing. Cannata's brother is a union organizer for unknown union group." (Defendant's Exhibit H). Respondent would have this Court believe that this was an inconsequential memorandum having no relationship to his termination. This contention is false.

The information contained in Exhibit H played a significant role in the decision to terminate respondent. Exhibit H was four pages of minutes of two meetings convened by the personnel department of the zone in which respondent worked to discuss union activity among Allstate personnel. (Vol. XIV, p. 1564-1572). Through respondent's examination of Allstate personnel, he established at trial that these meetings were attended by the very supervisors and managers who later made or approved the decision to fire him.² It was also established through the testimony of several witnesses that it was reported at the meeting that Cannata and another claim adjuster at Allstate would be interested in organizing a union at Allstate and that Cannata's brother was a union organizer. (Vol. XIV, pp. 1562, 1569, Vol. XVII, pp. 1828-1829). Thus, the evidence showed that only nine months before respondent's termination the persons who were later involved in the decision to terminate his employment heard it reported that he would be interested in organizing a union at Allstate. Therefore, the conclusion reached by the jury

2. The meetings were attended by, among others, Mr. Crise, respondent's immediate supervisor, who recommended his termination; Mr. Potter, the Regional Manager who approved respondent's termination; and Mr. Williford, the Regional Personnel Manager who also approved respondent's firing. (Vol. XIV 1572).

that respondent was terminated in material part for his pro-union activity or statements, was fully supported by the evidence.

B. Respondent Was Fully Aware of the Labor Issue Before the Trial and Introduced the Issue to the Jury.

Repeatedly protesting that "this was not a labor case," respondent claims that the preemption issue did not arise until after judgment when petitioner first raised it. The error of this claim is exposed by the remarks of respondent's counsel to the trial court and to the jury. During chambers discussions with the trial court prior to jury selection, respondent's counsel told the court that he had discovered evidence which showed that respondent was discharged for union activities or being favorable to a union:

"Mr. Barbagelata: 'I would like to state something right now *so the defendant doesn't claim surprise when the time comes.* There is a strong indication in the evidence as I have discovered it through discovery . . . that they felt he favored union activity for adjust[o]rs.' (Vol. II, p. 72; emphasis added.)

"Mr. Barbagelata: 'What I am saying is it may very well be that during the course of the trial, and perhaps I should do it now, to move the Court to—you see I don't like to do it, because I don't know what evidence is going to come out about it, but there is *some semblance of evidence in there that he was discharged for union activities or at least being favorable to a union.*'" (Vol. II, p. 73; emphasis added.)

In fact, at one point respondent's counsel told the trial court he was considering calling the former Regional Director of the National Labor Relations Board ("NLRB") as a witness:

"Mr. Barbagelata: 'Now, I don't know if this Roy Hoffman of the National Labor Relations Board could be classified as an expert witness. He is the head of the National Labor Relations Board, and I would merely call him to interpret some law. . . . If for some reason the Court found that I needed the head of the National Labor Relations Board here to testify as to some portion of the National Labor Relations Act, I would want to be free to call him.' " (Vol. II, p. 82)

Respondent's claim that the union issue and the possible jurisdiction of the NLRB never came up until after judgment rings hollow in the face of statements to the Court that he was considering calling the Regional Director of the NLRB as a witness to interpret the law and to testify on some portion of the National Labor Relations Act ("Act").

Finally, and most importantly, it was respondent's counsel who first introduced Cannata's union activity into the case telling the jury that his pro-union activity and statements may have been one of the reasons for his termination. In his opening statement Mr. Barbagelata said:

"So, you may find, the evidence may show to your satisfaction that because Joe did sympathize with the fact that perhaps a union might help some of the employees of Allstate, that perhaps this is one of the reasons they decided to get rid of him. And the evidence may show that." (Vol. III, p. 139.)

Having introduced the issue to the jury, and having stated that the evidence might show that respondent was terminated for sympathizing with unions, respondent can scarcely claim that this was an issue belatedly inserted into the case by petitioner.

C. Respondent's Contention That the Issue of Federal Preemption Was Not Raised in the Trial Court Until After Judgment Is Flatly Contradicted by the Record.

Respondent contends that "never, at any time before judgment was rendered against it" (Respondent's Brief, p. 11a) did Allstate file any document or pleading which alleged that the jurisdiction of the state court was preempted. This statement is false. On August 14, 1974, twenty-three days before the case was submitted to the jury, petitioner submitted its first memorandum in support of proposed jury instructions arguing that respondent's claims were preempted by the Act. Without quoting at length, petitioner's position was set forth in the second paragraph of the pleading:

"Allstate contends that if it is established that plaintiff was discharged for pro-union activity, his termination claim is entirely preempted by the National Labor Relations Act, (the NLRA) and *the conduct for which plaintiff seeks redress is solely within the jurisdiction of the National Labor Relations Board (NLRB)*. Therefore, this court is without power to award damages for plaintiff's discharge. (Clerk's Transcript, p. 797; emphasis added.)

Respondent answered with his own memorandum, which commences with a heading "Defendant's conduct is not subject to the jurisdiction of the National Labor Relations Board," and states:

"Defendants would have the court believe that their actions in discharging plaintiff constitute an unfair labor practice subject to the National Labor Relations Act, 29 USC 158(a)(3) and thus this court is without jurisdiction to award damages to plaintiff based upon defendants' unfair labor practice." (Clerk's Transcript, p. 803.)

Respondent's memorandum was answered by another memorandum for petitioner, which was met by a five page reply from the plaintiff. In summary, within the twenty-three days before the verdict, four memoranda were submitted to the trial court on the question of preemption. In view of this record, respondent's statement to this court that no pleadings were filed before judgment which argued that the jurisdiction of the state court was preempted must be viewed as an attempt to distort the record.

It must be concluded from the above that (1) respondent was terminated, in material part for his pro-union activity or statements, a fact which was discovered by respondent's counsel well before trial; (2) that respondent introduced the labor issue into the case telling the jury in opening statement that the evidence might show he was terminated for union activity or sympathies; and (3) that the preemption issue was raised and argued to the trial court shortly after commencement of trial.

II. THE JURY'S SPECIAL FINDINGS AND THE COURT OF APPEAL'S OPINION MEAN WHAT THEY SAY.

A. The Jury's Special Findings Are Clear.

Respondent attempts to escape the clear import of the jury's special findings by arguing that they do not mean what they say. This attempt must fail in the face of the only logical reading to which they are susceptible.

First, it is clear what the parties and the trial court *meant* by the special interrogatories submitted to the jury. Petitioner proposed a special interrogatory³ on the preemption issue as follows:

3. Question No. 1 was "Did plaintiff hold a position as a supervisor or managerial employee with defendant when he was terminated?"

"QUESTION NO. 2: Was plaintiff terminated, in whole or in part, because of *his* pro-union activity or statements?" (C.T. 993; emphasis added).

This clearly called for the jury to decide whether respondent's own pro-union activity or statements brought about his discharge. The Court, however, refused petitioner's proposed special interrogatories, and substituted its own parallel interrogatories for petitioner's nos. 1 and 2. At the end of defendant's special interrogatories the trial judge wrote "Refused—Lawrence A. Mana/Q1 & Q2—covered by interrogatories prepared by the court. . . ." (C.T. 994). Thus, it is clear that the trial judge intended to have the jury decide that which the petitioner wanted the jury to decide—whether respondent's pro-union activity or statements played a role in his discharge.

Second, the interpretation of the special finding suggested by plaintiff is illogical on its face. If the parties or the court had meant to have the jury decide whether the pro-union activities of *others* had played a role in plaintiff's discharge because of *his* failure to report them to management, the court simply would have asked that question.⁴

Finally, even if plaintiff's illogical and improbable meaning was to be ascribed to the jury's special finding, this case is still preempted under the arguable test set forth in *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959). The jury found that plaintiff was a non-managerial employee. The Court of Appeal further found that respondent's asser-

4. The meaning ascribed by plaintiff to this finding contains two unarticulated and highly improbable premises. The plain meaning, however, contains only one silent premise which logically arises from any critical reading—that it was petitioner's union activity in question. The only correct interpretation of the special finding is that the jury decided that plaintiff was discharged in material part for his own pro-union activity or statements.

tion that he was a supervisor "is without merit" (Opinion p. 8). It is a violation of §§ 8(a)1 and 8(a)3 of the Act to require a non-supervisor to report on the pro-union activity or statements of other employees. To discharge a non-supervisor for failing to carry on such illegal surveillance is also an unfair labor practice. *Izzi Trucking Co.*, 149 NLRB No. 108 (1964) *enfd.* 342 F2d 753 (1st Cir. 1965); *Goodyear Tire & Rubber Co.*, 159 NLRB No. 61 (1966) *enfd.* 394 F2d 711 (5th Cir. 1968).

B. The Court of Appeal's Opinion Is Clear.

Respondent is understandably uncomfortable with certain statements concerning the thrust of the evidence in the opinion of the Court of Appeal. The Court of Appeal, after a review of the entire record, determined (i) that the jury's special findings were supported by substantial evidence, and (ii) that in its review of the entire record there was evidence that Allstate was at least attempting to "chill", "if not in fact interfere with" employee Section 7 rights. (Opinion, page 7). Respondent is now asking this Court, without any record, to ignore the documented findings of the Court of Appeal. This suggestion makes a mockery of all standards of appellate review.

CONCLUSION

The Respondent's Brief reveals the desperation of his plight. He is unable to respond to the legal arguments contained in the petition, which upon documented findings of the Court of Appeal clearly mandate the application of the preemption rule. Respondent instead has chosen to flail at the jury's special findings and the Court of Appeal's determination that they were supported by the evidence. He also falsely accuses petitioner of inventing the preemption defense after the judgment. In support of this position he

attaches to his brief an Appendix replete with his selection of evidence from the record below and distorted argument purportedly based upon that evidence. This appears to be an attempt to overwhelm this Court with such a torrent of factual recitation as to induce it to turn from the petition and leave the parties in *status quo*. Petitioner is confident that this Court will perceive the pure legal issue of federal preemption presented in the petition and see the inherent inconsistency in the opinion of the Court of Appeal in failing to apply the doctrine of preemption to admittedly determined facts. This Court should grant the petition and order summary reversal of the judgment below.

Dated: May 26, 1977.

Respectfully submitted,

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